DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-223
Title: Richard A. Levin, Tax Commissioner of Ohio, Petitioner
v.
Commerce Energy, Inc., et al.
Docketed: August 24, 2009
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (08-3410)
Decision Date: February 4, 2009
Rehearing Denied: May 22, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Aug 20 2009	Petition for a writ of certiorari filed. (Response due September 23, 2009)
Aug 20 2009	Appendix of Richard A. Levin, Tax Commissioner of Ohio filed.
Sep 22 2009	Brief of respondents Commerce Energy, Inc., et al. in opposition filed.
Sep 23 2009	Brief amici curiae of Illinois, et al. filed.
Oct 2 2009	Reply of petitioner Richard A. Levin, Tax Commissioner of Ohio filed.
Oct 7 2009	DISTRIBUTED for Conference of October 30, 2009.
Nov 2 2009	Petition GRANTED.
Nov 23 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including December 24, 2009.
Dec 23 2009	Joint appendix filed.
Dec 23 2009	Brief of petitioner Richard A. Levin, Tax Commissioner of Ohio filed.
Dec 29 2009	The time within which to file the respondent's brief on the merits is extended to and including January 29, 2010.
Dec 30 2009	Brief amicus curiae of Multistate Tax Commission filed.
Dec 30 2009	Brief amici curiae of Illinois, et al. filed.
Jan 4 2010	SET FOR ARGUMENT ON Monday, March 22, 2010.
Jan 29 2010	Brief of respondents Commerce Energy, Inc., et al. filed.
Feb 3 2010	Record received from U.S.C.A. for 6th Circuit. 1 (box)
Feb 5 2010	Brief amicus curiae of Council on State Taxation filed.
Feb 23 2010	CIRCULATED.
Mar 1 2010	Reply of petitioner Richard A. Levin, Tax Commissioner of Ohio filed. (Distributed)
Mar 15 2010	Supplemental brief of respondents Commerce Energy, Inc., et al. filed. (Distributed)

Mar 22 2010 Argued. For petitioner: Benjamin C. Mizer, Solicitor General, Columbus, Ohio.
For respondents: Stephen C. Fitch, Columbus, Ohio.

PETITION FOR WRIT OF CERTIORARI

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No. 09-

In the Supreme Court of the United States

RICHARD A. LEVIN, Tax Commissioner of Ohio,
Petitioner,

v.

COMMERCE ENERGY, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court's decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), which addressed the scope of the Tax Injunction Act's bar against federal cases seeking to enjoin the assessment and collection of state taxes, eliminate or narrow the doctrine of comity—applied in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981)—which more broadly precludes federal jurisdiction over cases that intrude on the administration of state taxation?

2. Do either comity principles or the Tax Injunction Act bar federal jurisdiction over a case in which taxpayers allege, on equal protection and dormant Commerce Clause grounds, that their tax assessments are discriminatory relative to other taxpayers' assessments?

LIST OF PARTIES

The Petitioner is Richard Levin, the Tax Commissioner of the State of Ohio.

Respondents are Commerce Energy, Inc. (dba Commerce Energy of Ohio), Interstate Gas Supply, Inc., and Gregory Slone.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Richard Levin, Tax Commissioner of Ohio, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094 (6th Cir. 2009), and orders are reproduced at App. 1a-2a, 3a-18a. The United States District Court for the Southern District of Ohio's opinion and order is reproduced at App. 19a-33a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its original judgment and opinion on February 4, 2009. The Sixth Circuit denied rehearing en banc on May 22, 2009. The State of Ohio now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tax Injunction Act, Section 1341 of Title 28 of the United States Code, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

INTRODUCTION

Five years ago, this Court held in *Hibbs v. Winn*, 542 U.S. 88 (2004), that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, did not bar federal jurisdiction over an Establishment Clause challenge to an Arizona tax credit. Along the way, the *Hibbs* Court acknowledged a separate line of cases—exemplified by *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981)—that invoked principles of comity to deny federal jurisdiction over suits intruding on the administration of state tax systems. But *Hibbs* did not say whether its TIA holding had any effect on the comity doctrine.

The circuit courts are now sharply divided over the meaning of *Hibbs*. Specifically, the courts are split—four circuits to one—on the question whether *Hibbs* narrowed or altogether eliminated the comity doctrine, which *Fair Assessment* had expressly recognized extends beyond the TIA's scope. Under the reading of *Hibbs* adopted by the majority of those circuits, including the Sixth Circuit below, comity principles extend no further than the text of the TIA. The statute, in other words, has swallowed the preexisting comity doctrine whole, and *Hibbs* overruled *Fair Assessment sub silentio*. On that view, federal courts have jurisdiction to consider any challenge to a state taxation regime so long as the relief available to the plaintiff would not reduce the State's tax revenues.

This case illustrates why that approach is inconsistent with the comity doctrine, and even with *Hibbs*'s own reading of the TIA. Respondents challenge Ohio's system of taxing natural gas

suppliers as unconstitutional under both equal protection and dormant Commerce Clause principles. To resolve this suit and afford Respondents' requested relief, the federal court will have to engage in a detailed analysis of the manner in which Ohio administers its taxation and regulatory systems, which coexist in delicate balance. Neither longstanding comity rules nor *Hibbs*'s narrow exception to the TIA would permit such close federal court scrutiny of the State's tax scheme.

This Court's review is needed to resolve the confusion that *Hibbs* sowed among the lower courts as to both the scope of the TIA and the persistence of preexisting comity rules, and to restore the proper federalism balance in judicial scrutiny of state tax systems.

STATEMENT OF THE CASE

A. Respondents sued the State in federal court for allegedly discriminatory tax treatment.

Respondents are Commerce Energy, Inc. (dba Commerce Energy of Ohio), Interstate Gas Supply, Inc. ("IGS"), and Gregory Slone. Commerce Energy is a "retail natural gas supplier" or "independent marketer," as those terms are explained below, that sells natural gas in Ohio. App. 5a, citing Compl. ¶ 1. IGS is also such a seller, *id.* at ¶ 2, and Slone is a residential customer of IGS, *id.* at ¶ 3.

The natural gas market in Ohio has been partly deregulated, so that most residential and business consumers may purchase natural gas in one of two ways. First, the consumer may buy gas from the state-regulated public utility serving the

customer's area. These companies, which once were monopoly sellers in their respective areas, are called "natural gas companies" in Ohio law, Ohio Rev. Code § 4905.03(A)(6), and are also called "local distribution companies," or LDCs. See *General Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997). LDCs sell customers a "bundled product," supplying both the gas itself, as a commodity, and the service of delivering the gas by pipeline into the customer's home or business.

Second, a consumer may, under Ohio's "Consumer Choice" program, Ohio Rev. Code § 4929.02, purchase natural gas from any of the newer companies, such as Respondents, that now compete with the LDCs for retail sales of the unbundled "gas as a commodity" product. These companies are called "independent marketers," or IMs, see *Tracy*, 519 U.S. at 306, and Respondents call themselves "retail natural gas suppliers" or "Retail Suppliers." Compl. ¶ 1. When a consumer selects an IM, he actually buys two "unbundled products": delivery (from the LDC, which carries the product through its exclusive pipeline into the home) and the gas itself (from the IM). *Id.* at ¶ 20. A residential consumer receives a single bill from the IM, but the bill separately enumerates the charge due the LDC for delivery. *Id.* at ¶ 24. The IM then collects the full amount and remits the LDC's share to the LDC. *Id.*

The IMs and LDCs are subject to different regulatory and taxation regimes. Both IMs and LDCs share certain regulatory obligations, such as procedures for terminating residential service. See Ohio Rev. Code § 4929.22(D). But they face

divergent regulations. The LDCs, for example, are obliged to serve everyone in their respective territories—a duty that the IMs do not bear. Ohio Rev. Code §§ 4905.03, 4905.06, 4905.35; *Tracy*, 519 U.S. at 296-97. Also, the Public Utilities Commission of Ohio ("PUCO") regulates the LDCs' rates and sets tariffs on a "cost-plus" basis, which allows the LDCs to recover their costs under a set regulatory formula and earn a PUCO-approved fixed rate of profit. Ohio Rev. Code §§ 4905.22, 4905.302; Ohio Admin. Code Chapter 4901:1-14; e.g., *Vectren Energy Delivery of Ohio, Inc. v. PUCO*, 863 N.E. 2d 599 (2007) (applying the "gas cost recovery process" established under Ohio Admin. Code Chapter 4901:1-14); see also *Tracy*, 519 U.S. at 297.

Ohio's tax system also treats the two types of gas sellers differently, and Respondents object to the differences. First, customers, such as Respondent Slone, pay sales tax on their purchases of gas from IMs. Compl. ¶¶ 41-42. Ohio's statewide sales tax is 5.5%. Ohio Rev. Code §§ 5739.02-.025, 5741.02. Ohio's counties may add a "piggyback" sales tax of up to 3%. Ohio Rev. Code §§ 5739.021 et seq., 5749.021 et seq. Currently, the combined sales tax rate in Ohio's counties ranges from 6.0% to 7.5%. Compl. ¶ 41 & Ex. A.

Second, the IMs pay a business tax called the "commercial activities tax," or CAT, which applies to almost all Ohio businesses and taxes a company's gross receipts generated in Ohio. Compl. ¶ 49; Ohio Rev. Code § 5751.02. A company pays no tax on its first $150,000 in such gross receipts; it then pays a flat tax of $150 for receipts between $150,000 and $1

million. Ohio Rev. Code § 5751.03. Gross receipts over $1 million are taxed at 0.26%. *Id.*

LDCs, by contrast, do not pay the CAT, and their customers are exempt from paying the sales tax. Ohio Rev. Code §§ 5751.01(E)(2); 5739.02(B)(7), .021(E), .023(G), & .026(F); 5741.02(C); .021(A); .022(A); & .023(A). Instead, the LDCs pay a separate "gross receipts excise tax," or GRT, aimed solely at them. The GRT is charged at a rate of 4.75% of the sale price of the gas. Ohio Rev. Code § 5727.24. The GRT is also charged against a broad array of an LDCs' receipts beyond consumer sales of gas. Ohio Rev. Code § 5727.33. Ohio's public utilities regulations allow each LDC to include its GRT payments in its costs in calculating its allowed cost-plus rate that the LDC may charge consumers. See Ohio Admin. Code § 4901:1-14-05 (specifying formula for "gas cost recovery rate" and authorizing "other factors" to be specified in appendix to cited rule); see Appendix at http://www.registerofohio.state.oh.us/pdfs/4901/1/14/4901$1-14-5_FF_A_APP1_20040805_1202.pdf (last visited August 19, 2009).

LDCs also pay two other taxes that the IMs do not pay. The first, called the "MCF tax," is charged to LDCs based on the volume of gas that the LDCs sell and deliver. ("MCF" stands for "thousands of cubic feet," the basis for measuring such volume). Ohio Rev. Code § 5727.811. The second is a personal property tax that once was charged to almost all Ohio companies. That tax has now been phased out for most companies but retained for public utilities such as LDCs. Ohio Rev. Code § 5727.06.

According to Respondents' complaint, this different tax treatment violates equal protection and

dormant Commerce Clause principles. Respondents allege that the GRT is like the sales tax, in that the cost-plus regulations allow the LDCs to pass the cost on to customers.[1] Because the GRT rate is 4.75%, and the sales tax rates vary from 6% to 7.5%, Respondents allege that the "exemption from the sales tax for sales made by a Choice LDC (at least an exemption over and above what is paid pursuant to the gross receipts tax) discriminates against interstate commerce by providing an exemption that benefits" only LDCs. Compl. ¶ 48. They also allege that the "exclusion of LDCs from the CAT imposes an additional tax on the sales of natural gas by [IMs] that is not imposed on the sales of natural gas by LDCs."

Respondents requested the following relief:

1. a "declaration that the exemptions/ exclusions identified above, either individually or together, violate the Commerce Clause . . . and/or violate the Equal Protection Clause";

2. "an order invalidating" the exemptions;

---

[1] Respondents' comparison between the sales tax and the GRT is questionable, although the question need not be resolved for purposes of the threshold jurisdictional issue presented in this Petition. The sales tax is paid by retail customers such as Plaintiff Slone, while the GRT is paid by LDCs (although current utility-rate regulations allow the cost to be included in an LDC's cost calculations in setting rates). In addition, the GRT is analogous, under Ohio law, to the CAT, which Respondents also attack. While the issue of the proper comparison need not be resolved at this jurisdictional stage, the issue's existence is notable for the reasons explained below at 22-23.

3. a "permanent injunction enjoining" Petitioner Levin and his agents from "recognizing and/or enforcing these exemptions/exclusions"; and

4. "[s]uch other relief to which Plaintiffs are entitled."

Compl., Prayer for Relief.

B. The federal district court dismissed on comity grounds, but the appeals court reversed and allowed the case to proceed.

The State moved to dismiss, arguing that both the TIA and comity principles preclude federal jurisdiction. App. 21a-22a, 26a. With respect to the TIA, the district court first held that Respondents fell under the *Hibbs* allowance for third-party challenges because they are not challenging their own tax liability. *Id.* at 24a. The court added that invalidating the LDCs' exemptions would increase, not decrease, the State's revenue. *Id.* The court therefore concluded that the TIA did not bar the suit. *Id.* at 26a.

The district court then held, however, that comity principles did bar the suit. *Id.* at 29a, 31a. The court reasoned that *Hibbs* did not alter the scope of the comity bar, because "[n]owhere did the *Hibbs* Court address principles of comity beyond the scope of determining the TIA's application to the case before it." *Id.* at 27a. The court noted that "general principles of comity extend beyond the rationale underlying the TIA," *id.* at 28a, and it concluded that such principles required dismissal, *id.* at 29a, 31a.

The Sixth Circuit reversed, holding that neither the TIA nor comity is a bar to suit. The appeals court first adopted the district court's reasoning as to the TIA. *Id.* at 6a, 9a. The court then reversed the district court's comity holding, finding that *Hibbs* had narrowed *Fair Assessment*'s broad description of comity, and that, following *Hibbs*, comity—like the TIA—can be invoked "only when plaintiffs try to thwart tax collection." *Id.* at 11a. The court acknowledged that "there is a circuit split" on the issue, *id.* at 10a, but it concluded that the "Seventh and Ninth Circuits have the more persuasive view," *id.* at 11a, and that "*Hibbs*'s logic. . . compels us to reject the approach endorsed by the district court and the Fourth Circuit," *id.*

REASONS FOR GRANTING THE WRIT

The Court should grant the State of Ohio's petition and reverse the Sixth Circuit's judgment. As the Sixth Circuit itself noted, the circuits are divided on the first question presented. The opinion below also conflicts with this Court's decisions in *Fair Assessment* and *Hibbs*. Consequently, the Court should grant the Petition to resolve these conflicts and clarify the scope of federal jurisdiction over challenges to state tax laws.

A. The circuit courts are divided on the question of the comity rule's vitality following *Hibbs*.

The State agrees with the Sixth Circuit's reasoning in one significant respect: "[T]here is a circuit split" on the scope of the comity doctrine vis-à-vis the TIA. That division of authority derives from the circuits' different readings of this Court's TIA-based decision in *Hibbs*, and of the effect, if any, that *Hibbs* had on the Court's earlier comity-based decision in *Fair Assessment*.

1. This Court has explained that the comity doctrine extends beyond the TIA, and the Fourth Circuit has followed that understanding.

The jurisdiction of a federal court over a challenge to a state tax law can be barred in one of two ways: by the TIA or by principles of comity. The TIA provides that a federal court may not "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The comity doctrine,

meanwhile, cuts a broader swath, prohibiting cases that intrude upon several interests related to state sovereignty, even if the relief sought does not formally seek to enjoin tax collection. *Fair Assessment*, 454 U.S. at 111. As the Court explained, "federal courts, in exercising the discretion that attends requests for equitable relief, may not even render declaratory judgments as to the constitutionality of state tax laws." *Fair Assessment*, 454 U.S. at 103 (citing *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943)).

The Court has long made clear that the comity bar is not coterminous with the TIA. The doctrine took root in cases that preceded the TIA's enactment in 1937, see *Matthews v. Rodgers*, 284 U.S. 521 (1932); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481 (1913); *Boise Artesian Water Co. v. Boise City*, 213 U.S. 276 (1909), and has continued to have independent life since.

In *Great Lakes*, for instance, the Court barred federal jurisdiction over a suit for declaratory relief against a state tax law. The Court looked to the then-recently enacted TIA and found that the statute's terms do not encompass actions for declaratory relief. 319 U.S. at 299. Instead, the Court held that "those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." *Id.* By "those considerations," the Court meant principles of federalism—"'[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to

interfere by injunction with their fiscal operations." *Id.* at 298.

The Court confirmed in *Fair Assessment* that the comity doctrine extends beyond the bounds of the TIA. The plaintiffs in that case sought damages under 42 U.S.C. § 1983, not injunctive or declaratory relief, to redress an allegedly unconstitutional administration of a state tax system. 454 U.S. at 101. Citing *Great Lakes*, the Court explained that comity has a broader scope than the TIA alone, and that "the principle of comity which predated the Act was not restricted by its passage." *Id.* at 110. Thus, the *Fair Assessment* Court declined to decide whether the TIA also would have barred the challenge at issue, because the comity principle bars taxpayers "from asserting § 1983 actions against the validity of state tax systems." *Id.* at 116; see also *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 525-26 n.33 (1981) ("[E]ven where the Tax Injunction Act would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief.").

The comity bar reaches beyond suits that would directly impede state revenue with good reason: because the federalism concerns that underlie the comity rule themselves extend more broadly than simply protecting the state fisc. *Fair Assessment*, 454 U.S. at 109 n.6, 114-15. For example, cases challenging state tax administration, even if based on federal constitutional law, "'are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.'" *Id.* (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J.,

concurring in part and dissenting in part)). Also, any judgment against the State, regardless of the relief sought, would involve a predicate determination that the state tax system was unconstitutional—the equivalent of the declaratory judgment barred in *Great Lakes*. And allowing such cases in federal court would allow taxpayers to bypass available state procedures. *Fair Assessment*, 454 U.S. at 109 n.6. Finally, "[i]n addition to the intrusiveness of the judgment, the very maintenance of the suit itself would intrude on the enforcement of the state scheme," because "State tax collection officials could be summoned into federal court to defend their assessments," impeding their enforcement of State law. *Id.* at 114.

The TIA, by contrast, has a more limited compass. The Court in *Hibbs* held that the TIA did not bar a suit seeking to invalidate, on Establishment Clause grounds, state "income-tax credits for payments to organizations that award educational scholarships and tuition grants to children attending private schools." *Hibbs*, 542 U.S. at 92.

Three factors were critical to the Court's decision allowing the federal suit in *Hibbs* to proceed. First, the Court explained that the TIA, by its text, "proscribes interference only with those aspects of state tax regimes that are needed to produce revenue—*i.e.*, assessment, levy, and collection." 542 U.S. at 105 n.7. Because a judgment invalidating a tax credit would increase, not decrease, the State's revenue, the Court held that the TIA does not bar attacks on tax credits. *Id.* at 93. Second, the *Hibbs* Court stressed that the plaintiffs

before it were "third parties" who objected to the provision of credits to *other* taxpayers—not taxpayers objecting to their *own* tax liability. *Id.* at 93, 108. And third, because the challenge in *Hibbs* was based on the Establishment Clause, not state tax law, the plaintiffs had "not asked the District Court to interpret any state law." *Id.* at 106 n.8. The Court explained that the TIA had never been raised, and federal jurisdiction never questioned, in a litany of cases alleging that tax laws violated the Establishment Clause or amounted to racial discrimination—disputes, in other words, in which the analysis did not turn on tax doctrine. *Id.* at 93, 110-12.

The *Hibbs* Court had little to say on the independent doctrine of comity. In a footnote, the Court observed:

> [T]his Court has relied upon "principles of comity," Brief for Petitioner 26, to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection. See *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 107-108, 70 L Ed 2d 271, 102 S. Ct. 177 (1981) (Missouri taxpayers sought damages for increased taxes caused by alleged overassessments); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-299, 87 L. Ed. 1407, 63 S. Ct. 1070 (1943) (plaintiffs challenged Louisiana's unemployment compensation tax).

Id. at 107 n.9. And in a separate footnote, the Court distinguished a First Circuit case that had rested on comity grounds rather than the TIA. *Id.* at 109 n.11 (citing *United States Brewers Ass'n v. Perez*, 592 F.2d 1212 (1st Cir. 1979)). But the Court did not expressly address the relationship between comity and the TIA, nor did it suggest, in citing *Fair Assessment* and *Great Lakes*, that its decision affected those earlier holdings.

The Fourth Circuit accordingly held, in *DirecTV v. Tolson*, 513 F.3d 119, 127-28 (2008), that *Hibbs* had no effect on the Court's comity teachings. In that case, the plaintiffs brought a dormant Commerce Clause challenge to North Carolina's system of taxing multichannel television programming. *Id.* at 120. The court explained that the plaintiffs were asking the court to reinstate an earlier taxing regime that North Carolina had abandoned, and "[i]t is just this sort of heavy-handed federal court interference in state taxation that the principle of comity is intended to avoid." *Id.* at 125.

The Fourth Circuit gave three reasons for rejecting the plaintiffs' argument that, in the wake of *Hibbs*, comity principles no longer reached any further than the TIA. *Id.* at 127. First, "*Hibbs*' characterization of prior tax cases was intended to underscore the unusual claim before the Court in *Hibbs*, not to disavow [this Court's] earlier holdings" in *Fair Assessment* and *Great Lakes*. *Id.* at 127 (citing *Hill v. Kemp*, 478 F.3d 1236, 1249 & n.11 (10th Cir. 2007)). Second, *Hibbs* focused on the TIA's revenue-protecting purpose, whereas the purpose of the comity doctrine—to obviate federal court interference in state taxing and regulatory

authority—is broader. And third, *Hibbs* footnote 11 had distinguished the First Circuit's decision in *U.S. Brewers v. Perez*, 592 F.2d 1212, as a case based on "comity concerns," not on the Butler Act (the TIA-analogue that applies to Puerto Rico). *DirecTV*, 513 F.3d at 128 n.5 (citing *Hibbs*, 542 U.S. at 109 n.11). The Fourth Circuit in *DirecTV* took that distinction to mean that the *Hibbs* Court saw no tension between its TIA holding and *U.S. Brewers*' comity reasoning, because *Hibbs* did not touch the comity bar. *Id.*

The Fourth Circuit therefore held that, after *Hibbs*, the comity doctrine may still bar federal jurisdiction over cases to which the TIA does not apply. And those cases include disputes in which the plaintiffs, as in *DirecTV*, seek to use the dormant Commerce Clause to force the State to enhance its coffers by imposing a tax.

2. The First, Seventh, and Ninth Circuits have held that *Hibbs* narrowed the comity doctrine to extend no further than the TIA.

In stark contrast with the Fourth Circuit, the First, Seventh, and Ninth Circuits all have held that *Hibbs* sharply limited—if not eliminated—the scope of the comity bar. Indeed, these courts have said not only that comity is now narrower than it was in *Fair Assessment*, but also that comity in fact reaches no further than the TIA itself.

The degree to which these courts read *Hibbs* as having affected the comity doctrine is most clearly illustrated by the First Circuit's recent reversal of course. In its earlier decision in *U.S. Brewers*, the

First Circuit had held that "[s]ound equity practice and a concern for interests of federalism" barred a federal challenge to Puerto Rico's tax on large beer producers. *U.S. Brewers*, 592 F.2d at 1215. In *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 5 (1st Cir. 2009), the First Circuit confronted a similar challenge to Puerto Rico's taxation scheme for beer producers. The *Coors* court acknowledged that, "[i]f not for *Hibbs*, *U.S. Brewers* would control the resolution of this action." *Id.* at 16.

But then the court noted the growing "circuit split" on the question "[w]hether the principles of comity described in *U.S. Brewers* are intact after *Hibbs*." *Id.* It explained that "[t]he Sixth and Seventh Circuits have adopted a narrowed view of comity principles in light of *Hibbs*," and that "[t]he Ninth Circuit has also suggested that *Hibbs* limited the reach of comity in this context." *Id.* (citing *Commerce Energy*, 554 F.3d at 1098-99; *Levy v. Pappas*, 510 F.3d 755, 761-62 (7th Cir. 2007); *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005)). By contrast, the First Circuit noted, the Fourth Circuit "has relied on *U.S. Brewers*, even after *Hibbs*, to refuse jurisdiction over a challenge to a state tax regime's allegedly preferential treatment of cable companies over satellite TV companies." *Id.* (citing *DirecTV*, 513 F.3d at 126-28).

The First Circuit then took its place alongside the Sixth, Seventh, and Ninth Circuits, rejecting the Fourth Circuit's reading of *Hibbs*. The court read footnote 9 of *Hibbs*—in which this Court stated that it "has relied upon 'principles of comity' to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to

arrest or countermand state tax collection," *Hibbs*, 542 U.S. at 107 n.9 (citation omitted)—as limiting both the TIA and the comity doctrine to the same revenue-protective purpose. *Coors*, 562 F.3d at 17. The First Circuit then disagreed with the Fourth Circuit's reading of *Hibbs* footnote 11 as approving of *U.S. Brewers*' broader comity holding. Instead, the First Circuit said, the *Hibbs* Court merely cited *U.S. Brewers* as a "related" case "in obvious tension" with *Hibbs*'s holding, "not as an endorsement of [*U.S. Brewers*'] result." *Id.* at 17-18. The First Circuit also relied on the Sixth Circuit's decision below and concluded that "*Hibbs* confined principles of comity to cases seeking to arrest or countermand state tax collection." *Id.* at 18.

The Seventh Circuit similarly has read *Hibbs* as limiting the comity rule, so much so that one unitary standard applies for both the TIA and comity. *Levy v. Pappas*, 510 F.3d 755, 761 (7th Cir. 2007). *Levy* recited the standard as follows:

> When a plaintiff alleges that the state tax collection or refund process is singling her out for unjust treatment, then the Act and comity bar the federal action, as in *Fair Assessment*. When a plaintiff alleges that the state tax collection or refund process is giving unfair benefits to someone else, then according to *Hibbs* the Act and comity are not in play.

Id. (citations and quotations omitted). Under this unitary jurisdictional rule, comity applies if and only if the TIA also applies. In the Seventh Circuit's formulation, in other words, the TIA swallows the comity doctrine.

The Ninth Circuit, like the First and Seventh, also has concluded that *Hibbs* eliminated comity's once-independent scope. In *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005), the court rejected a TIA defense as well as an alternate comity bar. Citing *Hibbs*'s footnote 9, the court said that comity, like the TIA, applied only to cases in which plaintiffs sought "to arrest or countermand state tax collection," and the *Wilbur* plaintiffs did not do so. *Id.*

3. The Sixth Circuit has broadened the split.

In its decision below, the Sixth Circuit explained the division among the circuits, rejected the Fourth Circuit's view, and joined the circuit courts holding that *Hibbs* restricted not just the TIA but also the comity bar. App. 10a-12a.

The Sixth Circuit offered four principal reasons for concluding that *Hibbs* limited the comity doctrine. First, the Sixth Circuit, like the appeals courts with which it sided, explained that the *Hibbs* Court's language in footnote 9 "is hard to square . . . with . . . [an] expansive reading of *Fair Assessment*." App. 9a. Second, the Sixth Circuit observed that the Ninth Circuit in *Hibbs* had expressly addressed (and rejected) comity in the decision on review, and that this Court, though without "extensively analyz[ing] comity," affirmed the Ninth Circuit's decision in whole. *Id.* at 12a. Thus, the court reasoned, the *Hibbs* Court implicitly rejected a broader view of comity. Third, the Sixth Circuit noted this Court's concern in *Hibbs* that, under an expansive reading of the TIA, a series of earlier Establishment Clause and race-discrimination precedents would have been

jurisdictionally barred. *Id.* "This same logic applies to comity," the Sixth Circuit said, for a broad comity bar likewise would have barred the earlier precedents cited by *Hibbs*. *Id.* Finally, the Sixth Circuit worried that a broad comity rule would "render an Act of Congress entirely superfluous," because the comity rule would subsume the TIA. *Id.* at 17a.

The Sixth Circuit sent mixed signals on whether its view would fully eliminate, or just sharply limit, comity's broader scope. On one hand, the court identified itself with the Seventh and Ninth Circuits and described a comity standard that was identical to the TIA standard outlined in *Hibbs*. *Id.* at 10a-11a. On the other hand, the court said that "principles of comity and federalism sweep somewhat more broadly than the" TIA alone, *id.* at 18a, even after being narrowed in *Hibbs*, and that the only question was whether Respondents' claims fell outside the scope barred by comity, *id.*

But any lip service that the Sixth Circuit gave to retaining comity's "somewhat . . . broad[er]" scope cannot be squared with its refusal to apply comity to bar *this* case, as even a diminished comity rule should preclude Respondents' suit. Only by placing comity in lockstep with the TIA—that is, by eliminating it as an independent jurisdictional bar—could the Sixth Circuit have allowed a federal court to proceed with a suit that, as explained in Part B.1 below, requires an intrusive review of Ohio's taxation and regulation of natural gas sellers.

Regardless of whether the Sixth Circuit left comity dead or merely on life support, however, two things remain clear. First, *Hibbs* has thrown the

precedential force of *Fair Assessment* and *Great Lakes* into substantial doubt. Second, the circuits are divided as to the scope and vitality of the comity doctrine in the wake of *Hibbs*. Not only have several circuit courts acknowledged that division, but the litmus test for a circuit split is satisfied here: This case would have come out differently in the Fourth Circuit, under a straightforward application of *Fair Assessment*, from the way it did in the Sixth. That division of authority and the confusion among the circuits make this case worthy of review.

B. The decision below conflicts with the Court's decisions in *Fair Assessment* and *Hibbs*.

While the division of authority among the circuits is reason enough to grant the Petition, the need for review is strengthened by the conflict between the Sixth Circuit's opinion and this Court's decisions in *Fair Assessment* and *Hibbs*.

1. The decision below conflicts with *Fair Assessment*.

First, by allowing an intrusive federal review of Ohio's tax system, the decision below squarely conflicts with the Court's protection of state sovereignty in *Fair Assessment*. That is certainly true if, as the State submits (and the Fourth Circuit held), *Hibbs* did not narrow or eliminate the comity rule. Under *Fair Assessment*'s robust formulation of the doctrine, this case crosses the comity line because it asks the federal courts to review details of Ohio's taxation of different types of natural gas sellers and declare that one group has an unfair advantage over another. Even if *Hibbs* narrowed

Fair Assessment, however, any remnant of a comity bar cannot be squared with allowing this intrusive review of Ohio's tax laws to proceed.

Three different aspects of this case demonstrate the intrusiveness of Respondents' suit. First, to assess Respondents' claims of discriminatory taxation, the district court will need to undertake a granular analysis of Ohio tax law. For example, the district court would need to understand the operation of different state taxes in order to determine which taxes to compare for equal protection purposes. Specifically, Respondent Commerce Energy argues that the "gross receipts tax" ("GRT"), which LDCs pay, should be compared to the sales tax. But under State law, the GRT is analogous to the State's commercial activity tax, or CAT, as both the GRT and CAT are franchise taxes imposed on the privilege of doing business. Further, to fully resolve Respondents' claims of differential treatment, the district court would also need to review the details of two other taxes that the LDCs, but not IMs such as Respondents, must pay—the "MCF tax," charged on the volume of gas sold, and a personal property tax. Ohio Rev. Code § 5727.811; § 5727.06.

Second, in evaluating Respondents' claims, the district court also would need to scrutinize closely the State's public utility law. For example, Respondent Commerce Energy complains that its customers must pay sales tax of up to 7.5 percent, while customers of other gas sellers—the LDCs—pay only the passed-along "gross receipts tax" ("GRT") of 4.75 percent. There is a critical difference, however, in the way Ohio law imposes the two taxes. Under

the sales tax, the end consumer pays the tax; the natural gas retailer is merely the collection agent for the State. Under the GRT, by contrast, the LDC is the taxpayer, and, as a matter of state tax law, the tax stops there. To the extent the tax is "passed on" to the consumer, it is the result not of tax law, but of state utilities law. See Ohio Admin. Code § 4901:1-14-05 (specifying formula for "gas cost recovery rate" and authorizing "other factors" to be specified in appendix to cited rule).

Third, even if the district court were to find an equal protection or dormant Commerce Clause violation, any remedy it might craft would necessarily offend comity principles. To begin with, "an order of a federal court requiring [State] officials to collect taxes which its legislature has not seen fit to impose on its citizens" is "a particularly inappropriate involvement in a state's management of its fiscal operations." *U.S. Brewers*, 592 F.2d at 1215. Moreover, Ohio law ensures that no company pays two gross-receipts taxes on the privilege of doing business. The CAT, which covers most business, does not single out LDCs for an exemption; rather, it exempts all businesses that already pay an industry-specific gross-receipts tax (such as the GRT on LDCs or specific taxes on insurance companies and financial institutions). See Ohio Rev. Code § 5751.01(E). Thus, any attempt to "level the playing field" as to the CAT exemption would require the federal court to consider state laws against duplicate taxation of gross receipts.

Recent similar cases out of Ohio demonstrate that, when properly handled, tax challenges such as Respondents' require a close inspection of state tax

law. For instance, in *Tracy*, 519 U.S. 278, a customer of an independent marketer brought equal protection and dormant Commerce Clause challenges to the different ways that Ohio law taxed LDCs and IMs at the time. In resolving the case, this Court carefully reviewed Ohio's tax and utility regimes. *Id.* at 295-98. And just last year, the Ohio Supreme Court rejected a similar suit brought by another type of company in the natural gas market, an "interstate pipeline company." That challenge also turned on differences between IMs and LDCs and on details of Ohio law. *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St. 3d 122 (2008), cert. denied, 129 S. Ct. 896 (2009).

If Respondents' challenge goes forward in federal court, the discovery and decision will be much like those in *Tracy* and *Columbia Gas*. The suit would require the federal court to delve into the intricacies of both Ohio's tax law and the public utility regulatory scheme. This case therefore presents a textbook example of the comity concerns that animated *Fair Assessment*, and any claim that the Sixth Circuit afforded comity a "somewhat . . . broad[er]" scope than the TIA cannot be taken seriously.

2. The decision below conflicts with *Hibbs*.

Second, even if the Sixth Circuit was correct that *Hibbs* sets identical standards for both the TIA and comity, the decision below nonetheless conflicts with *Hibbs* itself—and should be barred under the TIA—for several reasons. For one thing, the *Hibbs* Court explained that the plaintiffs there were "third parties"—outsiders to the tax credit at issue who did

not object to their own tax treatment. 542 U.S. at 93, 108. Instead, the taxpayer-plaintiffs in *Hibbs* stated a generalized objection to having their tax money "spent" (in the form of credits or forgone revenue) on a program that they believed advanced religion in violation of the Establishment Clause. Respondents here, by contrast, complain that their own tax treatment is unfair, as compared to the tax treatment of the LDCs. Even if one accepts at face value that Respondents are seeking cancellation of the LDCs' benefits rather than tax exemptions of their own—a dubious assumption, for the reasons explained below—the fact remains that their complaint hinges on *their own tax treatment* vis-à-vis someone else's. At bottom, Respondents insist that they are being unfairly taxed as compared to the LDCs, and they want the federal courts to level the playing field. Their status is therefore not akin to the third-party plaintiffs in *Hibbs*.

Moreover, the suit here is not of the subject-matter type that *Hibbs* allowed to proceed under the TIA. The *Hibbs* Court stressed that the third-party plaintiffs' claims arose under the Establishment Clause, and that federal courts historically had adjudicated such challenges, like racial discrimination claims, without trenching on federalism concerns. 542 U.S. at 93-94, 110-12. Indeed, this Court in *Fair Assessment* left the same space open under the comity doctrine, expressly declining "to decide . . . whether the comity spoken of would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race." 454 U.S. at 107 n.4. Respondents' argument, by

contrast, is that the State's tax law treats them differently from other natural gas suppliers. By its nature, that claim requires detailed scrutiny of Ohio's tax system and its utility-regulation scheme.

Respondents' requested relief also implicates the very "state-revenue-protective" purposes of the TIA underscored in *Hibbs*, 542 U.S. at 106. In *Hibbs*, the plaintiffs' demand to invalidate the challenged tax credits could not possibly have led to revenue reduction, because their claim—that allowing such credits offended the Establishment Clause—could not be alleviated by granting plaintiffs the same allegedly unconstitutional credit. Here, by contrast, Respondents demand equal tax treatment. And although they purport to seek only the cancellation of the LDCs' exemptions, the settled practice in such cases—regardless of Respondents' artful pleading—is to *extend* tax benefits rather than to cancel them. See *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979) (explaining that "extension, rather than nullification, is the proper course" to remedy equal protection violation); *Cherry Hill Vineyards, LLC v. Schneider*, 553 F.3d 423, 435 (6th Cir. 2008) (same, for dormant Commerce Clause violation). Thus, if Respondents were to succeed on the merits, the district court in this case would most likely exempt them from the complained-of taxes, not terminate the LDCs' exemptions, regardless of how the complaint is framed. That relief is particularly likely given that the LDCs are not parties to the federal suit. (The State's motion to join the LDCs as indispensable parties remained pending when the district court dismissed the action on comity grounds.)

What is more, remedying Respondents' tax objection is not as simple as eliminating the LDCs' exemption or extending it to Respondents. Rather, Respondents complain that their customers pay a higher tax rate of up to 7.5% (differing by county), and that the competitor LDCs' customers pay a different, substitute tax—the GRT—at a rate of only 4.75%. The complaint says not that the LDCs' sales-tax exemption alone is discriminatory, but that the exemption, "at least an exemption over and above what is paid pursuant to the gross receipts tax," discriminates. Compl. ¶ 48. That means that a district court could not achieve parity by invalidating the LDCs' sales-tax exemption, because such invalidation alone would leave the LDCs with much higher taxes.

Instead, to level the playing field (as to the sales tax versus GRT claim), the federal court would need to do one of two things. The court could couple the invalidation of the LDCs' sales-tax exemption with an injunction against levying the GRT against the LDCs, so that both LDCs and IMs would equally pay the sales tax. But the TIA would squarely bar such an injunction, as such an order would of course "enjoin . . . collection of [a] tax under state law." Or the court could take a scalpel to the sales-tax exemption and reduce it by however many percentage points are needed, on a county-by-county basis, to eliminate the gap. But such careful tailoring of a state tax code is exactly the kind of federal court interference that the TIA and comity are designed to prevent.

The Sixth Circuit dismissed concerns about enjoining the LDCs' payment of the GRT by saying

that it need not concern itself with what might happen in "a hypothetical future lawsuit" in which the LDCs might "seek[] to enjoin the imposition of other taxes," leading to lost revenue. But the Sixth Circuit was mistaken in attributing that injunction to a "hypothetical" second lawsuit. Surely no court would, in this case, invalidate only one tax exemption and tilt the field the other way, leaving it to the LDCs to start a new case to even things up. Any injunction enforcing "equality," as Commerce Energy posits it, would have to take account of the GRT in its disposition of *this case*.

Likewise, Respondents' claim regarding the CAT also cannot be resolved simply by invalidating the LDCs' exemption. As explained in Part B.1 above, both the CAT and the GRT are franchise taxes imposed on the privilege of doing business, and the amount assessed is based on gross receipts. Ohio law provides that no entity pays two such taxes; any entity paying the GRT or any other industry-specific gross receipts tax is exempt from the CAT. Thus, invalidating the exemption and forcing LDCs to pay the CAT would trigger a need either to enjoin a different state tax (in plain violation of the TIA) or to craft a new tax that fills the gap.

All of this shows that the Sixth Circuit was mistaken when it shoehorned this case into its reading of *Hibbs*. The decision below not only conflicts with both the TIA and the comity doctrine, but it also demonstrates the circuit courts' continuing conflict and confusion over both doctrines. The Court's review is therefore warranted to clarify the scope of both the TIA and comity in the wake of *Hibbs*.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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August 20, 2009

APPENDIX

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(2)

Supreme Court, U.S.
FILED
09-223 AUG 20 2009
OFFICE OF THE CLERK

No. 09-____

In the Supreme Court of the United States

RICHARD A. LEVIN, Tax Commissioner of Ohio,
Petitioner,

v.

COMMERCE ENERGY, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

No. 08-3410

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMERCE ENERGY, INC.,
DOING BUSINESS AS COMMERCE ENERGY
OF OHIO, INC., ET AL.,

Plaintiffs-Appellants,

v.

RICHARD A. LEVIN, IN HIS OFFICIAL CAPACITY
AS OHIO TAX COMMISSIONER,

Defendant-Appellee.

ORDER
Filed: May 22, 2009

BEFORE: MARTIN and MCKEAGUE, Circuit Judges; and COLLIER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in

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* Hon. Curtis L. Collier, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Clerk

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206
File Name: 09a0036p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-3410

COMMERCE ENERGY, INC. dba COMMERCE ENERGY OF OHIO, INC., et al.,

Plaintiffs-Appellants,

v.

RICHARD A. LEVIN, in his official capacity as Ohio Tax Commissioner,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 07-00151—Michael H. Watson, District Judge.

Argued: December 10, 2008

Decided and Filed: February 4, 2009

Before: MARTIN and McKEAGUE, Circuit Judges; COLLIER, Chief District Judge.*

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* The Honorable Curtis L. Collier, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

COUNSEL

ARGUED: Stephen C. Fitch, CHESTER, WILLCOX & SAXBE, Columbus, Ohio, for Appellants. Barton A. Hubbard, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Stephen C. Fitch, Gerhardt A. Gosnell II, CHESTER, WILLCOX & SAXBE, Columbus, Ohio, for Appellants. Barton A. Hubbard, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. Plaintiffs, in-state and out-of-state retail natural gas suppliers that market and sell natural gas to Ohio consumers and one of their Ohio customers, sued Ohio's Tax Commissioner, Richard Levin. They alleged that Ohio's tax scheme is discriminatory and thus unconstitutional under either the Commerce Clause or Equal Protection Clause because four local natural gas distribution companies benefit from certain tax exemptions and exclusions that they do not benefit from, despite their similar situations. But the district court granted the Commissioner's motion to dismiss for lack of subject matter jurisdiction, reasoning that, while the Tax Injunction Act, 28 U.S.C. § 1341, did not bar plaintiffs' claims, general principles of comity and federalism did. This latter conclusion was incorrect, and we therefore reverse and remand.

I.

Plaintiffs Commerce Energy, Inc. (which does business as Commerce Energy of Ohio, Inc.) and Interstate Gas Supply, Inc. are retail natural gas suppliers who market and sell natural gas to Ohio consumers.[1] Plaintiff Gregory Slone is an Ohio citizen who purchases natural gas from these retail suppliers. The plaintiff gas suppliers compete with local natural gas distribution companies who market and sell gas to Ohio consumers. These companies, unlike the plaintiffs, also own and operate distribution pipeline networks to deliver gas. While the plaintiff retail suppliers pay fees to use the distribution pipelines owned by the local gas distribution companies, the four local natural gas distributors are exempt from state and county sales and use taxes on their natural gas sales and instead pay a gross receipts excise tax that is lower than the taxes that retail suppliers pay. According to plaintiffs, Ohio law also excludes these local distributors from commercial activities taxes on taxable gross receipts. Finally, plaintiffs also challenge Ohio tax provisions that exclude sales of natural gas between local distributors from gross receipts taxes that the plaintiffs are subject to when they purchase natural gas from the local gas distributors.

The plaintiffs sued under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, requesting that the district court declare these exclusions and

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[1] Because this case arises on a motion to dismiss, this Court must assume that all facts asserted in plaintiffs' complaint are true.

exemptions unconstitutional and enjoin their application. The defendant Tax Commissioner responded by moving to dismiss these claims under FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction. The court dismissed plaintiffs' complaint, reasoning that general principles of comity and federalism barred their claims. Plaintiffs appeal.

II.

This Court reviews de novo the dismissal of a complaint under FED. R. CIV. P. 12(b)(1) for lack of subject matter jurisdiction. *Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist.*, 166 F.3d 835, 837 (6th Cir. 1999).

III.

The first issue is whether the district court properly ruled that the Tax Injunction Act did not bar plaintiffs' challenges to the constitutionality of Ohio's natural gas taxation scheme. The Act directs federal courts not to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341.[2] It thus deprives federal courts of jurisdiction to hear certain challenges to state tax schemes. *California v. Grace Brethren Church*, 457 U.S. 393, 396 (1982). In *Hibbs v. Winn*, 542 U.S. 88 (2004), the Supreme Court clarified the Act's scope and reach. The plaintiffs there had brought an Establishment Clause challenge to income tax

[2] The parties agree that there is an adequate state-court remedy available.

credits that provided financial aid to children who attended private schools. *Id.* at 92-93. The Supreme Court held that the Act did not bar jurisdiction, and observed that for "near a half century, courts in the federal system, including the [Supreme] Court have entertained challenges to tax credits authorized by state law, without conceiving of § 1341 as a jurisdictional barrier." *Id.* at 93. The Court sharply distinguished such cases from those in which the Act had barred claims, stating that the former "[a]ll involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes). Federal-court relief, therefore, would have operated to reduce the flow of state tax revenue." *Id.* at 106. In line with the Act's primary purpose of protecting state tax revenue, the *Hibbs* Court interpreted "assessment" to mean only the "recording of liability" of the taxpayer, and thus the Act applies only to "cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *Id.* at 107. As the district court correctly recognized, the Act does not prevent "third parties from pursing constitutional challenges to tax benefits in a federal forum." *Id.* at 108. And, as with *Hibbs*, the taxpayers here are third-parties who do not "contest their own tax liability," *id.* at 92, and success on their claims would not reduce state tax income: the relief they seek would increase the state's tax revenue by eliminating some or all of the tax-reducing exemptions and exclusions.

The Tax Commissioner replies that if plaintiffs are successful then state tax revenues could theoretically decrease in the future because the natural gas distribution companies could possibly file a future lawsuit seeking to enjoin the imposition of

other taxes, and, if that future lawsuit succeeded, tax revenues would decrease. This argument is strained, to say the least. Indeed, we recently rejected it: "The Act does not strip federal courts of jurisdiction over all claims that might, after this or that happens, have *some* negative impact on local revenues; it strips jurisdiction over claims seeking to enjoin the collection of State '*tax* revenue.'" *BellSouth Commc'ns, Inc. v. Farris*, 542 F.3d 499, 503-04 (6th Cir. 2008) (emphasis in original). It is thus not enough that there is some theoretical chance revenues might decrease due to a hypothetical future lawsuit; *Hibbs* tells us the Act is more straightforward: it applies only to "cases in which state taxpayers seek" to "avoid paying state taxes" where success would "operate[] to reduce the flow of state tax revenue." *Hibbs*, 542 U.S. at 106-07.[3] We

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[3] For support, the Commissioner also cites *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237, 1243 (11th Cir. 1991), which the *Hibbs* Court distinguished from the case before it by stating that *Colonial Pipeline* "held that a taxpayer's suit seeking a court-ordered redistribution of Georgia's ad valorem tax system, which might have reduced plaintiff's tax bill, implicated § 1341's jurisdictional bar." *Hibbs*, 542 U.S. at 109 n.11. Yet the Commissioner improperly reads "might" to mean any hypothetical chance. Instead, *Colonial Pipeline* explained that it was not "impressed by Colonial's contention that the impact of its requested relief would act only to increase the valuation and assessment of currently undervalued property. . . . [I]mplementation of its requested relief could also have the *equally likely* alternative of *reducing* the assessments on Colonial's own property." 921 F.2d at 1242 n.8 (first emphasis added, second emphasis in original). Here, the chance of a decrease of state tax revenues is far less than "equal" to the chance of an increase.

therefore affirm the district court's conclusion that the Tax Injunction Act does not bar plaintiffs' claims.

IV.

Notwithstanding the Act, the district court went on to rule that principles of comity and federalism barred plaintiffs' claims. These principles reflect a "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts" and thus they sometimes bar federal challenges to state taxation where the Act would not. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102, 108 (1981). In *Fair Assessment*, the Supreme Court addressed the comity principle's applicability to suits bringing constitutional challenges to state tax laws under 42 U.S.C. § 1983. Although the question presented was narrow, *Fair Assessment*'s language was broad: "[T]axpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts" so long as "plain, adequate, and complete" state court remedies are available. *Id.* at 114-16.

Nevertheless, in *Hibbs*, the Supreme Court—without disapproving of *Fair Assessment*'s core holding—stated that it has "relied upon 'principles of comity' . . . to preclude original federal-court jurisdiction only when plaintiffs have sought district court aid in order to arrest or countermand state tax collection." *Hibbs*, 542 U.S. at 107 n.9 (emphasis added) (citing *Fair Assessment*, 454 U.S. at 107-08). Thus, while the *Hibbs* Court did not extensively address comity, it is hard to square that decision with the district court's expansive reading of *Fair Assessment*.

A.

Yet there is a circuit split. The district court heavily relied on *DirecTV v. Tolson*, 513 F.3d 119 (4th Cir. 2008), which, in dismissing a § 1983 claim, rejected the idea that *Hibbs* did anything to limit an expansive reading of *Fair Assessment* because the comity principle is "broader than the Act itself, and its scope is not restricted by § 1341." *DirecTV*, 513 F.3d at 127 (citing *Fair Assessment*, 454 U.S. at 110). To the Fourth Circuit, the comity principle's breadth "was simply not before the Supreme Court in *Hibbs*." *Id.* at 127-28.

Other circuits disagree. The Seventh Circuit, for instance, has reconciled these cases by holding that *Fair Assessment* cannot bar each and every challenge to a state's taxation scheme because *Hibbs* "restrict[s] comity to cases that could tie up rightful tax revenue." *Levy v. Pappas*, 510 F.3d 755, 761 (7th Cir. 2007) (quotations omitted). *Levy* explained:

> When a plaintiff alleges that the state tax collection or refund process is singling her out for unjust treatment, then the Act and comity bar the federal action, as in *Fair Assessment*. When a plaintiff alleges that the state tax collection or refund process is giving unfair benefits to someone else, then according to *Hibbs* the Act and comity are not in play.

Id. at 762. Similarly, the Ninth Circuit, in *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005), took at face value Hibbs's admonition that comity principles preclude jurisdiction "only when plaintiffs have sought district-court aid in order to arrest or

countermand state tax collection" and observed that the plaintiffs before it sought "no such relief." 423 F.3d at 1110 (quoting *Hibbs*, 542 U.S. at 107 n.9).

Animating these courts' disagreement with the Fourth Circuit are twin concerns. First, a sweeping reading of *Fair Assessment* runs squarely against *Hibbs*'s instruction that comity guts federal jurisdiction only when plaintiffs try to thwart tax collection. *Hibbs*, 542 U.S. at 107 n.9.[4] Second, an unduly broad view of comity would render an Act of Congress—the Tax Injunction Act—effectively superfluous, as its contours would never be dispositive so long as extant "comity principles" uniformly barred challenges to state taxation. In recognizing this, the *Hibbs* Court warned lower courts that prior cases in this area are "not fairly cut loose from their secure, state-revenue-protective moorings." *Id.* at 107.

B.

The Seventh and Ninth Circuits have the more persuasive view. And, even independent of its language, *Hibbs*'s logic also compels us to reject the approach endorsed by the district court and the Fourth Circuit. In *Hibbs*, the Supreme Court affirmed *in toto* a Ninth Circuit decision that—along

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[4] In fact, the *Fair Assessment* Court did not purport to go as far as the Fourth Circuit interpreted. The *Fair Assessment* Court noted that it "need[ed] not decide . . . whether the comity spoken of would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race." *Fair Assessment*, 454 U.S. at 107 n.4.

with holding that the Act did not bar plaintiffs' claims—had specifically addressed and rejected comity as grounds for dismissal. In fact, two Ninth Circuit judges would have voted to rehear that case en banc because they believed that the claims were barred by comity. *Winn v. Killian*, 321 F.3d 911, 913-14 (2003) (Kleinfeld, J., dissenting, joined by O'Scannlain, J.). Yet, though the Supreme Court did not extensively analyze comity, it both affirmed the Ninth Circuit in full and stated that its opinion doing so was not inconsistent with comity principles. *Hibbs*, 542 U.S. at 107-08 & n.9.

More importantly, the *Hibbs* Court stated that barring the claims before it would have been inconsistent with a series of prior Supreme Court cases reviewing challenges to state tax systems that had no jurisdictional infirmities. *Id.* at 111. Just as with a broad reading of the Act, if a broad reading of comity forbade the relief requested here, then any injunctions that compelled or led inevitably to the collection of state taxes would be called into question, including *Milliken v. Bradley*, 433 U.S. 267 (1977). *Hibbs* loudly voiced this concern: "In a procession of cases not rationally distinguishable from this one, no Justice or member of the bar of this Court ever raised a § 1341 objection that, according to the petitioner in this case, should have caused us to order dismissal of the action for want of jurisdiction." *Hibbs*, 542 U.S. at 111-12 (citing *Mueller v. Allen*, 463 U.S. 388 (1983)). This same logic applies to comity. If the Tax Commissioner is correct that broad comity principles bar federal courts from hearing claims like the plaintiffs', then likely all the previous Supreme Court decisions that did not even address the Act or comity principles were decided incorrectly.

See, e.g., *Missouri v. Jenkins*, 495 U.S. 33, 57 (1990) (ordering state to collect taxes in amounts exceeding the ceiling set by state law). We have no choice but to respect these Supreme Court judgments.

C.

To support the idea that comity and federalism principles bar vast swaths of state-tax challenges, the Tax Commissioner and the district court both cite and heavily rely upon this Court's pre-*Hibbs* decision, *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988). Yet, though *Gillis* broadly warned that "principles of comity dictate that a federal court should not intrude into the state tax system . . . [a]s long as an adequate state remedy exists," *id.* at 1009, it also indicated that it was simply on all fours with *Fair Assessment*, and thus the above analysis reconciling *Hibbs* with *Fair Assessment* applies equally to *Gillis*. And below, the district court gave *Gillis* its broadest conceivable reading, which it felt was untouched by *Hibbs*, while the plaintiffs argue that *Hibbs* undermined or flatout overruled Gillis. Yet both views are too extreme: *Gillis* does not bar jurisdiction in this case and it may be reconciled with *Hibbs*.

Indeed, we cannot resolve this case with abstract generalizations about nontextual constitutional principles of comity and federalism. And though we emphatically reject the view that these principles broadly bar from federal court nearly every state-tax challenge, we also cannot make all-encompassing decrees regarding how principles of comity and federalism will always apply; they are merely *principles*. To determine whether comity and federalism preclude jurisdiction

over state taxation claims, courts must determine whether the relief requested in the pleadings would significantly intrude upon traditional matters of state taxation such that dismissal is necessary. Thus, the difference between this case and *Gillis* concerns the degree to which the claims and relief requested would intrude upon a state's power to organize, conduct, and administer its tax scheme. In *Gillis*, the plaintiffs went too far; here, they have not.

In *Gillis*, the district court broadly certified a plaintiff class consisting of every single Kentucky citizen who owned taxable property and whose property was assessed via the challenged methods, and it had certified a defendant class of "all property valuation administrators of counties in which taxable property owned by coal, oil, or gas interests is located." *Gillis*, 836 F.2d at 1008. By contrast, the plaintiffs here are two retail natural gas suppliers and a natural gas purchaser and the sole defendant is the Ohio Tax Commissioner. If plaintiffs' claims were to succeed, the only entities affected would be four natural gas distributors and the only taxes affected would be a limited class of exemptions that apply to only these four entities. And so it is not foreseeable that Ohio would have to substantially revise its tax code if their claims succeeded, and the suggested intrusion into traditional matters of state taxation here is not significant enough to trigger comity to bar jurisdiction.

D.

Finally, at oral argument, the Commissioner contended that if the plaintiffs' claims are ultimately successful, hundreds of thousands of Ohio consumers might see their taxes rise because in-state natural

gas companies would pass any tax increase to their consumers. As a result, he argues that comity requires dismissal. We reject this argument for three reasons. First, the issue was not briefed, so we cannot take judicial notice of so complex an *ipse dixit* from the Commissioner. While economists agree that it is people and not corporations in the abstract that bear tax burdens, they disagree on who ends up footing this bill and in what proportion.[5] Some economists have argued that consumers pay all corporate taxes in the form of higher prices. Others have argued instead that the tax is borne by shareholders because supply and demand dictates that the prices of the underlying products must have already been set to maximize profits before the tax was imposed, and so any increase in prices would decrease demand; thus, shareholders bear the cost as a tax on equity capital. Or, in what seems to be the modern trend, yet other economists argue that the

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[5] The authorities are mixed. *See, e.g.*, Richard A. Posner, Economic Analysis Of Law 706 (Aspen Publishers, 3d ed. 2007) ("The burden of [corporate taxes] is normally shared between consumers and shareholders."); Harvey S. Rosen, Public Finance, (McGraw-Hill/Irwin, 6th ed. 2002); Joseph E. Stiglitz, Economics Of The Public Sector, (Norton, 2d ed. 1988); William C. Randolph, International Burens of The Corporate Tax, Congressional Budget Office Working Paper (2006) ("[D]omestic labor bears slightly more than 70 percent of the burden of the corporate income tax."), *available at* http://www.cbo.gov/doc.cfm?index=7503; Gregory N. Mankiw, *The Problem With the Corporate Tax*, N.Y. Times, June 1, 2008 ("The ultimate payers of the corporate tax are those individuals who have some stake in the company on which the tax is levied. If you own corporate equities, if you work for a corporation or if you buy goods and services from a corporation, you pay part of the corporate . . . tax.").

corporate tax burden is shared in some proportion not only by consumers and shareholders, but also by workers. This is because capital is mobile and it will flow to other investments that produce higher returns after taxes when a new tax is imposed because the imposition of new taxes lowers an activity's expected after-tax return. With less capital stock due to this capital flight, the workers become less productive and therefore earn lower wages. The point is that we must not thrust ourselves into the middle of this economic debate by blindly accepting the Commissioner's theory.

The second reason is that, in the context of whether a state tax challenge is barred from federal court by principles of comity and federalism, the Commissioner's argument is "heads I win, tails you lose." Both parties agree that if plaintiffs' success were sure to lead to a decrease in state taxes, then a federal forum would be inappropriate. *Hibbs*, 542 U.S. at 107 n.9. Yet, the Commissioner further argues that the plaintiffs' claims here would nevertheless significantly burden traditional matters of state taxation because they would *increase* state tax revenues and that increase would allegedly be passed directly to Ohio's consumers. In other words, the Commissioner contends that claims that would result in *either* a decrease *or* in an increase in state tax revenues should *both* be barred by principles of comity and federalism such that nary a state tax challenge could be heard in federal court. This would bar any and all federal challenges, inconsistent with our comity discussion above.

Third and finally, even if the Commissioner's theory that any tax burden would pass directly to

Ohio consumers were correct, that would not alter our conclusion that the plaintiffs' claims are not barred by comity concerns. The Commissioner's argument seems to be that plaintiffs' challenges automatically create an impermissible burden on comity and federalism because corporate taxes are allegedly passed directly to consumers. But the fact that it might burden consumers cannot be enough: the Supreme Court has never intimated that challenges to discriminatory personal or consumption taxes may not, as a class, be heard in federal court so long as doing so would not otherwise significantly burden comity and federalism.[6] Thus, a possible injunction against the tax breaks challenged here would not impermissibly burden state taxation.

V.

In this case we reject an excessively expansive reading of the older cases discussing comity as urged upon us by the Commissioner because that reading would render an Act of Congress entirely superfluous, would ignore the Supreme Court's directive that comity strips jurisdiction "only when plaintiffs have sought district-court aid in order to

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[6] Moreover, the fact that some tax costs might affect "hundreds of thousands of consumers" is a red herring because, even if true, it tells us nothing about the magnitude of the cost or burden—all costs passed on to prices are spread among all consumers, yet that cost might still be quite small in the aggregate. Indeed, in our above analysis we already determined that plaintiffs' requested relief would not, in sum, impermissibly burden state taxation, and whether that cost is shared by shareholders, consumers, or workers must be irrelevant. The inquiry is about magnitude; it's not a headcount.

arrest or countermand state tax collection," *Hibbs*, 542 U.S. at 107 n.9, and would *sub silentio* overrule a series of important cases from the lower courts and Supreme Court, including *Milliken v. Bradley*, 433 U.S. 267 (1977), *Mueller v. Allen*, 463 U.S. 388 (1983), and possibly even *Hibbs* itself. That is unacceptable. But, though principles of comity and federalism sweep somewhat more broadly than the Act, the pertinent question is whether the claims and requested relief fall within that sweep. Because comity is prudential, we can make few generalizations about when it applies. Instead, our holding is narrow: the plaintiffs here challenge only a few limited exemptions that affect four specific entities, and their success would not significantly intrude upon traditional matters of state taxation in Ohio.

For the above reasons, we REVERSE the district court and REMAND for further proceedings.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:07-cv-00151
JUDGE WATSON

Commerce Energy, Inc., et al.,

Plaintiffs,

v.

Richard A. Levin,

Defendant.

OPINION AND ORDER

Dated: February 21, 2008

Plaintiffs bring claims under the Commerce Clause of the U.S. Constitution, Article 1, §8, clause 3, and the Equal Protection Clause of the U.S. Constitution, Fourteenth Amendment. Plaintiffs assert Ohio's natural gas taxation scheme discriminates against interstate commerce by favoring local natural gas distribution companies over out-of-state businesses and treats similarly situated businesses and customers differently. This matter is before the Court on defendant's motion to dismiss (Doc. 5). In his motion, defendant argues the Tax Injunction Act, 28 U.S.C. § 1341, ("TIA") bars the Court from exercising jurisdiction over plaintiffs' claims. Additionally, defendant asserts principles of federalism and comity require the Court to decline to

exercise jurisdiction. For the reasons that follow, the Court **GRANTS** defendant's motion to dismiss.

I. Background

Plaintiffs seek declaratory and injunctive relief on the ground that Ohio's natural gas taxation scheme violates the Commerce Clause and Equal Protection Clause of the U.S. Constitution. The action challenges provisions of the Ohio Revised Code that either exempt or exclude local natural gas distribution companies ("LDCs") from imposition of certain taxes. Specifically, plaintiffs challenge Ohio Rev. Code §§ 5739.02(B)(7), .021(E), .023(G), and .026(F); 5741.02(C), .021(A), and .023(A); 5721.01(E)(2); and 5727.33(B)(5).

Plaintiffs Interstate Gas Supply, Inc. ("IGS") and Commerce Energy, Inc. ("Commerce Energy") are in-state and out-of-state retail natural gas suppliers (Retail Suppliers) in the business of marketing and selling natural gas to Ohio consumers as part of Ohio's Consumer Choice program. Plaintiff Gregory Slone is an Ohio citizen who purchases natural gas from IGS pursuant to Ohio's Consumer Choice program.

Local natural gas distribution companies ("LDCs") are also in the business of marketing and selling natural gas to Ohio consumers. However, LDCs also own and operate networks of distribution pipelines to transport and deliver natural gas to consumers. Retail Suppliers like IGS and Commerce Energy do not own or operate any distribution pipelines for transporting or delivering natural gas. Instead, Retail Suppliers pay a fee to use the distribution pipelines owned and operated by LDCs.

Under Ohio's Consumer Choice program, which is aimed at providing consumers with a choice of natural gas suppliers, LDCs and Retail Suppliers compete with each other in the sale of natural gas to consumers.

Plaintiffs allege Ohio's taxation scheme, as it applies to sales of natural gas to consumers in Ohio, discriminates against Retail Suppliers and their customers in favor of in-state LDCs and their customers. Under Ohio law, LDCs are exempt from paying state and county sales and use taxes on their natural gas sales. Ohio Rev. Code §§ 5739.02(B)(7), .021 (E), .023(G), and .026(F); 5741.02(C), ,021 (A), and .023(A). Instead, LDCs pay a gross receipts excise tax that is currently lower than the sales and use tax Retail Suppliers pay. Ohio law also excludes LDCs from imposition of the commercial activities tax on taxable gross receipts; Retail Suppliers are not exempt from the tax. R.C. 5721.02(B). Finally, plaintiffs challenge Ohio Rev. Code § 5727.33(B)(5), which excludes sales of natural gas between LDCs from the gross receipts tax. Retail Suppliers are subject to a gross receipts tax when they purchase natural gas from LDCs.

II. Motion to Dismiss

Defendant moves to dismiss plaintiffs' complaint under Fed. R. Civ. P. 12(b)(l) for lack of subject matter jurisdiction, Fed. R. Civ. P 12(b)(6) for failure to state a claim upon which relief can be granted, and Fed. R. Civ. P. 12(b)(7) for failure to join necessary and indispensable parties under Rule 19. (Docs. 5, 13). The Court must first determine whether it has jurisdiction over the subject matter of the plaintiffs' claims. Even if jurisdiction exists, the

Court may, in its discretion, decline to exercise such jurisdiction when its exercise would be "prejudicial to the public interest" and a "plain, adequate and complete" state remedy is available. *In re Gillis*, 836 F.2d 1001, 1006, 1009 (6th Cir. 1988) (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297 (1943); *Fair Assessment in Real Estate Ass'n. v. McNary*, 454 U.S. 100, 116 (1981)).

III. Discussion

A. Tax Injunction Act

Defendant first argues the Tax Injunction Act ("TIA") bars this Court from exercising jurisdiction over plaintiffs' claims. The TIA states: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341. The TIA also extends to actions seeking declaratory relief. *See California v. Grace Brethren Church*, 457 U.S. 393, 408 (1992); *Nat'l Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582, 587 (1995). There is no contention that a plain, speedy and efficient remedy is not available in the state courts for plaintiffs' claims constitutional. If the TIA applies, because plaintiffs are seeking to "suspend or restrain the assessment, levy or collection of any tax under State law," the Court must dismiss the case for lack of jurisdiction.

Plaintiffs argue the TIA does not apply, primarily relying upon the Supreme Court's decision in *Hibbs v. Winn*, 542 U.S. 88 (2004). In *Hibbs*, taxpayers brought an action under the Establishment Clause, challenging a state statute

that permitted tax credits for contributions made to organizations that award educational scholarships to children attending private schools. *Id.* at 92. The taxpayers sought a declaration that the statute was unconstitutional and an injunction prohibiting the state from allowing taxpayers to receive the tax credit. *Id.* The Court held that the TIA did not apply to the plaintiffs' action. *Id.*

The *Hibbs* Court sought to define the term "assessment" to determine if the relief requested fell within the text of the TIA. Employing interpretive canons, the Court defined "assessment" in the context of the statute so as not to render the terms "levy" or "collection" superfluous. *Id.* at 101. It rejected a broad administrative definition that would encompass any recording of tax liability and instead found the term to embody a "collection-propelling function." *Id.* at 102.

The Court then looked at the purpose of the TIA and the legislative history surrounding its enactment to confirm and further define this reading. It found Congress enacted the TIA to protect state revenue by directing taxpayers to "pursue refund suits instead of attempting to restrain collections," not to broadly restrict all federal court interference in state tax collections. *Id.* at 104-05. The Court found the TIA applies where "state taxpayers seek federal-court orders enabling them to avoid paying taxes." *Id.* at 107. The TIA does not prevent "third parties from pursuing constitutional challenges to tax benefits in a federal forum." *Id.* at 108.

The taxpayers in *Hibbs* were third-parties who did not "contest their own tax liability." *Id.* at 92.

They did not seek to prevent the state's receipt of tax revenue. *Id.* On the contrary, the relief they sought would increase the state's tax revenue because it would eliminate the revenue-reducing tax credit. Therefore the taxpayers' action was outside the scope of the TIA. *Id.*

This Court finds *Hibbs* determines whether the TIA applies in the present case. As directed by *Hibbs*, this Court must first identify the relief sought. *See Hibbs*, at 99. Here, plaintiffs request a declaration that the challenged statutes are unconstitutional, an order invalidating the exemptions and exclusions, and an order enjoining the recognition and enforcement of the exemptions and exclusions. Plaintiffs are not contesting their own tax liability. Nor are they trying to avoid paying their own taxes. Like tax credits, tax exemptions provide a tax benefit to the party exempted or excluded from the imposition of a tax. As such, plaintiffs are third-parties challenging the constitutionality of a tax benefit. Furthermore, the relief plaintiffs request would not disrupt the flow of tax revenue. Preventing enforcement of the exemptions and exclusions would make natural gas companies (LDCs) subject to state and county sales and use taxes on natural gas sales, the commercial activity tax, and a gross receipts tax for inter-LDC natural gas sales, any one of which would increase state tax revenue.[1]

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[1] Defendant argues tax revenue *might* not increase if plaintiffs receive the relief they request because, at some future point, the LDCs might seek to enjoin the imposition of other taxes to which they are currently subject. The Court will not speculate

Defendant argues *Hibbs* is distinguishable from the present action because it was brought under the Establishment Clause, involved financially disinterested parties, and could be cured only by eliminating the tax credit. The Court is not persuaded by these arguments. Defendant cites four cases discussed in *Hibbs* and argues they are more similar to the instant case because they were brought under Equal Protection grounds by financially-interested parties and sought relief that would impose additional taxes upon similarly-situated taxpayers.

First, defendant cites *Kraebel v. New York City Dep't of Housing Preservation & Dev.*, 959 F.2d 395 (2d Cir. 1992), and *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237 (11th Cir. 1991). *Kraebel* involved a taxpayer challenging the administration of a tax exemption and abatement scheme. *Colonial Pipeline* involved a challenge to the state's ad valorem property tax system. In both cases, the courts found the actions barred in federal court under the TIA. *Kraebel*, at 400; *Colonial Pipeline*, at 1243. The *Hibbs* Court, however, distinguished the cases not based on constitutional grounds, relief sought, or financial interest of the parties, but instead because they both involved taxpayers "seeking relief aimed at lightening their own tax burdens." *Hibbs*, at 109 n.9. Here, in contrast, plaintiffs do not seek to reduce their tax liability.

Next, Defendant cites a Sixth Circuit case, *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), and *State*

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about the effects that hypothetical lawsuits and their presumed outcomes might have on the present tax revenue.

Brewers Ass'n v. Perez, 592 F.2d 1212 (1st Cir. 1979). However, as the *Hibbs* Court noted, neither case rested its holding on the TIA; instead the courts found the exercise of jurisdiction was improper based upon principles of federalism and comity. *See Hibbs*, at 109 n.11; *Gillis*, at 1005; *Perez*, at 1214.

The Court finds no meaningful distinction between this action and *Hibbs* that would compel a different conclusion. Accordingly, under *Hibbs*, the Court holds the TIA does not bar the Court's exercise of jurisdiction over plaintiffs' claims.

B. Principles of Federalism and Comity

Even though the TIA does not bar the exercise of jurisdiction, the Court must still determine if the exercise of jurisdiction is appropriate in this case. Federal courts have long recognized that principles of comity may call for judicial restraint, particularly when matters involve state tax administration. *See, e.g., Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981); *California v. Grace Brethren Church*, 457 U.S. 100 (1982); *Nat'l Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582 (1995); *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988). Defendant argues principles of comity require the Court to exercise judicial restraint here.

Although the TIA is based upon principles of federalism and comity, it did not restrict the scope of those principles. *McNary*, at 110. "[T]he scope of federal court deference based on principles of comity is substantially broader than that required under the TIA." *Gillis*, at 1006. In *Huffman*, the Supreme

Court recognized a tradition of judicial restraint regarding state tax matters where state law affords an adequate remedy. *Huffman*, at 297. This exercise of discretion "is not a denial of the jurisdiction which Congress has conferred on the federal courts," but is instead a recognition that federal courts of equity may refuse to exercise jurisdiction when doing so "would be prejudicial to the public interest." *Id.* "It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states." *Id.* at 298. Courts should give due regard to the independence of state governments and be "reluctant to interfere by injunction with their fiscal operations . . . where the asserted federal right may be preserved without it." *Id.* This is true even where the constitutionality of a state or municipal tax is challenged. *Id.*

Plaintiffs argue the Supreme Court rejected a broad interpretation of comity in *Hibbs*. They maintain the *Hibbs* Court restricted its scope to those cases seeking to stop or countermand state tax collection. The Court disagrees; *Hibbs* did not restrict principles of comity as narrowly as plaintiffs suggest. After explaining why the Court's prior TIA comity decisions were consistent with the decision it was then announcing, the *Hibbs* Court stated: "We note, furthermore, that this Court has relied upon 'principles of comity' only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." *Hibbs*, at 107 n.9 (citing as examples *McNary* and *Huffman*; internal citation omitted.). The Supreme Court then went on to summarize its conclusion as to the TIA's

application. Nowhere did the *Hibbs* Court address principles of comity beyond the scope of determining the TIA's application to the case before it. In citing the Court's prior tax cases, it did not undermine their analysis or validity, but instead used them to illustrate the uniqueness of the case before it. As stated above, general principles of comity extend beyond the comity rationale underlying the TIA.

Plaintiffs further contend *Gillis* does not survive *Hibbs*. Plaintiffs argue the Supreme Court undermined the Sixth Circuit's analysis in *Gillis* by rejecting a broad interpretation of comity endorsed in *McNary* and *Huffman*. As stated above, the Court does not read *Hibbs* to even address, let alone restrict, the broader principles of comity which extend beyond those underlying the TIA. Neither does the Court read *Hibbs* to invalidate the Sixth Circuit's decision in *Gillis*, for reasons already stated. The Supreme Court in *Hibbs* distinguished *Gillis* as inapplicable because *Gillis* was decided on broader comity grounds, not the TIA. *See Hibbs*, at 109 n.11. Consequently, *Gillis* is still good law, which this Court is bound to follow.

Gillis involved a challenge to the state's system of assessing property taxes. The taxpayers sought a declaration that the state's assessment violated the Equal Protection Clause, and an injunction requiring all property values to be assessed at fair cash value. *Gillis*, at 1003. After a lengthy discussion about the TIA, the court did not determine whether the Act barred the court's jurisdiction. *Id.* at 1003-05. It acknowledged the TIA may not apply to the case, but still refused to exercise its jurisdiction, finding "principles of comity

were substantially broader than required by the TIA." *Id.* at 1006. The court found that requiring a reassessment as the plaintiffs requested, although essentially seeking to force the collection of additional taxes, was as much of an interference with state tax administration as a suit seeking to enjoin collection of a state tax. *Id.* at 1008. The court declined to interfere in this way, holding "principles of comity dictate that a federal court should not intrude into the state tax system . . . [a]s long as an adequate state remedy exits." *Id.* at 1009. While the facts and relief sought in *Gillis* may differ from plaintiffs' action here, the legal principles set forth in *Gillis* nonetheless apply to the instant case, and require this Court to decline to exercise jurisdiction over plaintiffs' claims.

Further support for this conclusion is found in the First Circuit's decision in *U.S. Brewers Ass'n. v. Perez*, 592 F.2d 1212 (1st Cir. 1979), a case virtually indistinguishable from plaintiffs' action here.[2] The action in *Perez*, brought by U.S. beer producers, challenged Puerto Rico's beer tax, asserting that it discriminated against outside countries in favor of Puerto Rican beer producers because the Puerto Rican producers were exempt from the tax. *Perez*, at 1213. The plaintiffs sought to either enjoin assessment of the additional tax on outside producers or to enjoin application of the tax

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[2] At the outset, this Court finds *Hibbs* did not in any way undermine the *Perez* decision. As it did with *Gillis*, the Supreme Court found the *Perez* decision inapplicable to the case before it because *Perez* was decided solely on comity grounds. *Hibbs*, at 109 n.11.

exemption on the Puerto Rican producers. *Id.* The *Perez* court first sought to determine whether the Butler Act, 48 U.S.C. 5 872, the TIA's Puerto Rican analog, barred the court's jurisdiction. The court in *Perez* found a suit to enjoin application of a tax exemption was outside the language of the Butler Act, although it *might* still be proper to go beyond the Act's literal language and apply it to such a case. *Id.* at 1214. Instead, however, the court based its decision on the principles underlying the Butler Act and TIA, "equity practice" and "principles of federalism." *Id.*

The *Perez* court first highlighted the two potential remedies for the plaintiffs' constitutional challenge. One was to enjoin the assessment of the additional tax on the plaintiffs, a remedy expressly precluded by the Butler Act. *Id.* The other was to enjoin the application of the tax exemption on Puerto Rican producers. *Id.* While the Butler Act might not expressly preclude the second remedy, the court nevertheless found it would "disrupt the orderly collection and administration of state taxes." *Id.* In the court's view, "an order of a federal court requiring Commonwealth officials to collect taxes which its legislature has not seen fit to impose on its citizens strikes us as a particularly inappropriate involvement in a state's management of its fiscal operations." *Id.* at 1215. The *Perez* court held: "Sound equity practice and a concern for interests of federalism thus bar both the injunctive and declaratory relief sought by appellant." *Id.* (citing *Huffman*).

After the *Hibbs* decision, the Fourth Circuit reached a similar result in *DirecTV, Inc. v. Tolson*,

—F.3d —, 2008 WL 95768 (4th Cir. 2008). The plaintiffs in *Tolson* were satellite television programming providers. They challenged a state tax on the grounds it violated the Commerce Clause by discriminating against direct broadcast satellite ("DBS") providers in favor of in-state traditional cable providers. *Id.* at *3. Some proceeds from the tax were distributed to local governments to replace a franchise tax in-state traditional providers previously paid to use public right-of-ways. *Id.* at *2. The plaintiffs in *Tolson* asserted that the tax discriminated against DBS providers by forcing them to subsidize a commodity that benefitted in-state cable providers. *Id.*

The court in *Tolson* held "principles of comity" restrained the court from granting the plaintiffs' requested relief. *Id.* at *8. In doing so, the court found *Hibbs* did not restrict the scope of comity expressed in *Huffman*, *McNary* or *Perez* as plaintiffs in the instant case suggest. *Id.* at *7-8. Instead, it found the "question simply was not before the Supreme Court in *Hibbs*." *Id.* at *8. The court relied heavily on *Perez*, and concluded principles of comity applied with greater force where plaintiffs were not seeking to enjoin administration of a single tax exemption, like in *Perez*, but were seeking a "court-ordered redistribution of intra-state taxation authority." *Id.* at *7.

In light of the above, the Court concludes principles of comity and federalism prevent it from exercising jurisdiction over plaintiffs' claims in the instant case. Plaintiffs here seek to enjoin the administration of several tax exemptions which the Ohio legislature chose to provide to natural gas

distributers. The Court finds an order requiring Ohio to "collect taxes which its legislature has not seen fit to impose" would be "a particularly inappropriate involvement in a state's management of its fiscal operations." *See Perez*, at 1215. The Court therefore declines to so interfere.

Additionally, as in *Perez*, the Court recognizes the availability of an alternative remedy should plaintiffs' constitutional challenges succeed. Instead of enjoining administration of the challenged tax exemptions, a state court could extend the exemptions to apply to Retail Providers like IGS and Commerce Energy. Plaintiffs did not seek this alternative relief in this action, presumably because they correctly understood that the TIA expressly bars federal court jurisdiction over such claims. Where there would be two possible remedies, this Court declines to impose its own judgment on the state legislature mandating which remedy is appropriate. This is particularly true where court-ordered imposition of additional taxes has traditionally been appropriate only as a "last resort," and where the sole basis for choosing Plaintiffs' requested remedy over the alternative is that the Court lacks jurisdiction to afford that alternative remedy. *See Hibbs*, at 112 n.12 (citing school desegregation cases as limited examples of court-ordered imposition of additional taxes). Because there is a "plain, adequate, and complete" remedy available in the state courts, the Court declines to exercise jurisdiction over plaintiffs' claims.

Because the Court finds dismissal appropriate on these grounds, it will not address defendant's

argument that plaintiffs have failed to join indispensable parties.

IV. Disposition

Based upon the above, the Court **GRANTS** defendant's motion to dismiss (Doc. 5).

The Clerk shall enter final judgment in favor of defendant, and against plaintiffs, dismissing this action for lack of jurisdiction.

The Clerk shall remove Doc. 5 from the Court's March 31, 2008 CJRA motions report.

IT IS SO ORDERED.

/s/ MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT

OPPOSITION BRIEF

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(3)

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No. 09-223

In The Supreme Court of the United States

RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO,
Petitioner,

v.

COMMERCE ENERGY, INC., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under this Court's decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), does either the Tax Injunction Act, 28 U.S.C. § 1341, or comity principles bar federal court jurisdiction over a case alleging federal equal protection and dormant commerce clause claims where the plaintiffs do not challenge their own tax assessment and the relief sought is directed to specific tax exemptions or exclusions applicable to only four other taxpayers.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents state as follows:

Respondent Commerce Energy Inc. is a California corporation and is a wholly-owned indirect subsidiary of Just Energy Income Fund. Just Energy Income Fund is an open-ended, limited-purpose trust established under the laws of Ontario, Canada. Trust units of Just Energy Income Fund are traded on the Toronto Stock Exchange. As of August 31, 2009, Acuity Investment Management Inc. ("Acuity") holds approximately 14.82% of the units of the Fund. Acuity publicly reports that the units were acquired in the ordinary course of business for investment purposes and not for the purpose of exercising control or direction over the Fund. Other than Acuity, to the knowledge of the Just Energy Income Fund, no publicly held company owns 10% or more of the trust units in Just Energy Income Fund.

Respondent Interstate Gas Supply, Inc. is not a publicly traded company, has no parent company, and no publicly held company owns 10% or more of its stock.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331 provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

In *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), a buyer of natural gas sought to challenge, on dormant commerce clause and equal protection grounds, Ohio's exemption of local distribution companies ("LDCs") from sales and use taxes on sales of natural gas. This Court declined to reach the substance of the dormant commerce clause claim based upon the Court's determination that LDCs and retail gas suppliers were not "similarly situated" for purposes of a commerce clause claim.

Since *General Motors* was decided, regulation of natural gas sales in Ohio has dramatically changed. LDCs and retail gas suppliers now compete directly in virtually all markets. *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 136 (2008) (". . . the main competitors of LDCs in the residential and small-business markets are not interstate pipeline companies. Rather, independent and LDC-affiliated marketers compete with LDCs for commodity sales in this market.") Nonetheless, Ohio has maintained its exemption from sales and use taxes for natural gas purchases from LDCs while imposing the same taxes on purchases from retail gas suppliers. In addition, in 2005, Ohio adopted a new commercial activities tax

("CAT"), which is imposed upon retail gas suppliers, among others, but from which LDCs are specifically excluded.

Given these changes, and the competitive nature of the natural gas commodity market, Respondents sought to have the substance of the dormant commerce clause claims advanced in *General Motors*, as well as federal equal protection claims, heard in the U.S. District Court for the Southern District of Ohio. The relief sought in Respondents' complaint was limited to a declaration that the exemptions/exclusions enjoyed by four LDCs under Ohio law violate the Commerce Clause and/or the Equal Protection Clause of the United States Constitution, and a permanent injunction enjoining recognition or enforcement of those exemptions/exclusions.

The District Court, on a motion to dismiss, held that its jurisdiction to hear Respondents' claims was not barred by the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, but was barred by general principles of federalism and comity. No discovery was had nor was any factual record developed prior to or in connection with the motion to dismiss. Because the district court found dismissal appropriate on comity grounds, it declined to rule on Petitioner's alternative argument that Respondents had failed to join indispensable parties. The Sixth Circuit affirmed with respect to the TIA but reversed the District Court's federalism and comity holding and remanded the case for further proceedings.

Petitioner filed a petition for rehearing en banc. After circulation to all active members of the Court, no judge of the Sixth Circuit requested a vote on the en

banc petition. The petition was subsequently denied by the original panel.

SUMMARY OF ARGUMENT

No circuit has adopted the Petitioner's position with respect to the TIA. With respect to federalism and comity, the Sixth Circuit's opinion below is in accord with three other circuits while the lone circuit supporting Petitioner's position, the Fourth Circuit, demonstrably erred in its analysis of this Court's holding in *Hibbs v. Winn*, 542 U.S. 88 (2004). In addition, the Fourth Circuit's judgment may be reconciled with the Sixth Circuit's opinion below. Accordingly, Petitioner's request for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

A. The District Court's and Sixth Circuit's Denial of Petitioner's TIA Argument Requires No Review.

Petitioner seeks review of the Sixth Circuit's affirmation of the District Court's decision that Respondents' claims are not barred by the TIA. Petitioner cites to no circuit court opinion in conflict with the Sixth Circuit's opinion on this issue. Nor does Petitioner assert that the question of law at issue has not been settled by this Court. Rather, Petitioner contends that the District Court and the Sixth Circuit erroneously applied the rule of law set forth in *Hibbs* to the facts in this case. Even if true, the misapplication of a settled question of law does not present grounds for review by this Court.

With respect to Petitioner's claim that the decisions below conflict with *Hibbs*, the District Court and the Sixth Circuit correctly found that there is no meaningful distinction between Respondents' action here and the action in *Hibbs*. Respondents are not contesting their own tax liability, are not trying to avoid paying their own taxes, and the relief requested would not disrupt the flow of tax revenue. In addition, *Hibbs* is not, by its terms or as applied, limited to Establishment Clause cases as Petitioner suggests. Finally, Petitioner's argument that the District Court would likely extend to Respondents the tax exemptions at issue even though Respondents have not sought an extension is, as noted by the Sixth Circuit, "strained, to say the least." *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094, 1097 (6th Cir. 2009).

In short, Petitioner has set forth no persuasive reasons why this Court should review the lower courts' interpretation and application of *Hibbs* to the facts in this case regarding the TIA.

B. The Circuit Split Relied upon by Petitioner is One-sided, Becoming Increasingly So, and is Likely to Remedy Itself.

The circuit split relied upon by Petitioner is due to a single circuit court decision, the Fourth Circuit's opinion in *DIRECTV, Inc. v. Tolson*, 513 F.3d 119 (4th Cir. 2008), which, when decided, contradicted two prior circuit court decisions and which has since been rejected by two other circuit courts, including the Sixth Circuit below. Thus the split is the result of a single circuit decision that was an anomaly when decided and has been rejected twice since being issued.

Prior to the Sixth Circuit's decision below, the circuit courts were evenly split on how expansively federal courts should apply this Court's opinion in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981), regarding the applicability of general comity principles to constitutional challenges to state tax laws. As the Sixth Circuit's opinion below recognized, the First Circuit (in a pre-*Hibbs* decision) and the Fourth Circuit (in a post-*Hibbs* decision) had issued opinions broadly interpreting *Fair Assessment*. *See U.S. Brewers Ass'n v. Perez*, 592 F.2d 1212 (1st Cir. 1979); *DIRECTV, Inc.*, 513 F.3d 119. The Seventh and Ninth Circuits, however, had recently held that under this Court's opinion in *Hibbs*, comity principles preclude jurisdiction only where the plaintiff sought to countermand state tax collection. *See Levy v. Pappas*, 510 F.3d 755 (7th Cir. 2007); *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005). In its decision below, the Sixth Circuit held that the Seventh and Ninth Circuits had the more persuasive view, thus creating a three to two circuit split.

Subsequent to release of the Sixth Circuit's opinion below, the circuit split has grown more one-sided. Seven weeks later, in March, 2009, the First Circuit filed its opinion in *Coors Brewing Company v. Mendez-Torres*, 562 F.3d 3 (2009), in which it abrogated its 1979 pre-*Hibbs* opinion in *U.S. Brewers Ass'n*. In so doing, the First Circuit's *Coors* decision relied heavily on the Sixth Circuit's opinion below as to the effect of *Hibbs* on the broad language in *Fair Assessment* and concluded that comity was not a bar to a federal court action that did not seek to arrest state tax collection. *Coors*, 562 F.3d at 18.

Since this Court's decision in *Hibbs*, four circuits have now applied *Hibbs* in a consistent manner regarding comity principles while only one circuit, the Fourth, has held to the contrary. The Fourth Circuit's opinion in *DIRECTV, Inc.* stands as an anomaly among otherwise uniform circuit court opinions. Contrary to Petitioner's contention, *Hibbs* has not sown confusion among the lower courts that requires resolution by this Court.

C. The Sixth Circuit Correctly Interpreted *Hibbs*.

Petitioner argues that the federal courts should ignore the specific language in this Court's opinion in *Hibbs* that it "has relied upon 'principles of comity,' . . . to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." *Hibbs* at 107, n.9. Rather, Petitioner seeks the adoption of a broad reading of *Fair Assessment* that would effectively bar any federal court jurisdiction involving a state tax-related matter.

The Sixth Circuit correctly determined that adoption of Petitioner's argument would not only be contrary to the express language in *Hibbs* but would also render the TIA superfluous since, under Petitioner's argument, principles of comity would already bar any challenge in federal court to a state tax-related matter. The Sixth Circuit also correctly noted that adoption of Petitioner's argument would call into question a series of important decisions where the federal courts had exercised jurisdiction in cases involving state taxation.

D. The Sixth Circuit's Opinion Does Not Limit Comity to the Parameters of the TIA.

In its opinion below, the Sixth Circuit stressed that "our holding is narrow." *Commerce Energy, Inc.*, 554 F.3d at 1102. The opinion rejects the Petitioner's argument that comity principles "broadly bar from federal court nearly every state-tax challenge," but also rejects the notion that principles of comity are co-extensive with the parameters of the TIA. Rather, the Sixth Circuit held that because Respondents' claims were directed to a few limited exemptions that affect only four specific entities, the relief sought would not significantly intrude upon traditional matters of state taxation.

The Sixth Circuit distinguished this case from its previous holding in *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), by noting that the plaintiff class in *Gillis* included every Kentucky citizen who owned taxable property assessed by the challenged method and the defendant class included most Kentucky county property tax administrators. As stated by the Sixth Circuit, "In *Gillis*, the plaintiffs went too far; here, they have not." *Commerce Energy, Inc.*, 554 F.3d at 1100.

E. The Sixth Circuit Opinion Below may be Reconciled with *DIRECTV*.

Contrary to the relief requested by Respondents below, the relief in *DIRECTV* did not simply involve the elimination of certain tax exemptions to third-parties. Rather, the plaintiffs sought relief that "would have the effect of restoring the system of local franchise taxation coupled with state-level tax credits

to cable providers" that existed prior to legislative amendments. *DIRECTV*, 513 F.3d at 124. The Fourth Circuit described the requested relief as "a federal court-ordered redistribution of intra-state taxation authority." *Id.* at 127. Thus, while the opinion in *DIRECTV* stands alone as to the effect of *Hibbs* on comity analysis, the relief requested in that case makes it akin to the Sixth Circuit's decision in *In re Gillis*. Thus the judgment in *DIRECTV* may be reconciled with the Sixth Circuit's decision below.

F. The Fourth Circuit's Opinion in *DIRECTV* is Based upon an Erroneous Analysis of this Court's Decision in *Hibbs*.

In *DIRECTV*, the Fourth Circuit based its decision regarding comity on the proposition that the question of comity "was simply not before the Supreme Court in *Hibbs*." *Id.* at 127-128. That proposition was in error. As the Sixth Circuit noted in its opinion below:

> In *Hibbs*, the Supreme Court affirmed *in toto* a Ninth Circuit decision that-along with holding that the Act did not bar plaintiffs' claims-had specifically addressed and rejected comity as grounds for dismissal . . . Yet, though the Supreme Court did not extensively analyze comity, it both affirmed the Ninth Circuit in full and stated that its opinion doing so was not inconsistent with comity principles.

Commerce Energy, Inc., 554 F.3d at 1099 (citations omitted).

The reference in *Hibbs'* footnote 9 to "Brief for Petitioner 26" refers directly to the alternative

argument advanced by Arizona's Director of Revenue that "even if the Tax Injunction Act did not preclude Respondents' federal court action, the principles of comity would." *Hibbs v. Winn*, Petr.'s Br., 2003 WL 22766739, *26. Further, the underlying opinion of the Ninth Circuit in *Hibbs* affirmed by this Court dealt extensively with the Director's alternative comity argument. *Winn v. Killian*, 307 F.3d 1011, 1018 (9th Cir. 2002).

Thus, the Fourth Circuit's opinion in *DIRECTV*, which Petitioner relies upon so heavily as a reason for granting a writ as well as the merits of his argument, was based upon a clearly erroneous reading of this Court's opinion in *Hibbs* as well as a First Circuit opinion (*U.S. Brewers Ass'n*) that has now been abrogated. The other circuits have recognized the infirmities in the Fourth Circuit's opinion in *DIRECTV* and do not need further guidance from this Court. In fact, the Fourth Circuit's comity analysis contained in *DIRECTV* has yet to be followed by any other court.

G. Petitioner's Consent to Federal Court Jurisdiction in *Cuno* Militates Against Granting a Writ.

Petitioner's assertion that review by this Court is necessary in this case in order to "restore the proper federalism balance in judicial scrutiny of state tax systems" (Pet. at 3) is undermined by Petitioner's previous consent to federal court jurisdiction to resolve similar state tax-related claims in *DaimlerChrysler v. Cuno*, 547 U.S. 332 (2006).

In *Cuno*, plaintiff taxpayers filed an action in state court challenging certain state tax credits and local

property tax abatements as being, *inter alia*, in violation of the federal dormant commerce clause. *Cuno v. DaimlerChrysler, Inc.*, 154 F.Supp.2d 1196 (N.D. Ohio 2001). The defendants, including the Ohio Tax Commissioner, removed the action to the U.S. District Court for the Northern District of Ohio. *Id.* The Commissioner subsequently opposed remand to the state courts (2000 WL 34611832), the District Court denied remand, and the action proceeded through the Sixth Circuit and to this Court.

The significance of *Cuno* here is that it demonstrates the situational nature of Petitioner's federalism and comity concerns. Where Petitioner believes a federal forum may be better suited for its position regarding state tax issues, he consents to removal and opposes remand as in *Cuno*. Where Petitioner believes the converse is true, he urges this Court to impose a sweeping bar to federal court jurisdiction. As the Sixth Circuit noted below in a different context, "the Commissioner's argument is 'heads I win, tails you lose.'" *Commerce Energy, Inc.*, 554 F.3d at 1101. Thus, based upon Petitioner's prior conduct regarding federal court jurisdiction over analogous state-tax related claims, this Court should reject Petitioner's professed federalism concerns and deny the writ.

CONCLUSION

For the reasons set forth above, Respondents ask that the petition for a writ of certiorari be denied.

Respectfully submitted,

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REPLY BRIEF

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No. 09-223

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In the Supreme Court of the United States

RICHARD A. LEVIN, Tax Commissioner of Ohio,
Petitioner,

v.

COMMERCE ENERGY, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

All parties appear to agree that a circuit split exists on the question whether the comity doctrine extends beyond the bounds of the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341. Respondents argue that the Court need not resolve this acknowledged division of authority, however, because it is lopsided and will dissipate on its own. Yet the current four-to-one circuit split shows no signs of going away, and could easily broaden. But even if Respondents are correct and the majority view is on its way to becoming unanimous, this Court's review is all the more warranted, for then the death knell will truly have sounded for the comity doctrine. If *Hibbs v. Winn*, 542 U.S. 88 (2004), meant to overrule more than a century of case law recognizing an independent comity bar to federal jurisdiction over state tax challenges, then the Court should say as much.

In addition to the circuit split, the Court should grant review to clarify the scope of the TIA. This case bears all the hallmarks of cases to which *Hibbs* itself intended to keep the federal courthouse doors closed: It requires a federal court to undertake a detailed analysis of state taxation and regulatory policy in order to adjudicate a claim by a group of taxpayers that, because the State taxes them unevenly, they are entitled to an order altering the State's tax regime. The TIA commits such cases to the state courts.

The Court should grant review to restore the proper federalism balance.

A. The division of authority among the circuits warrants this Court's review.

Respondents appear to offer alternative arguments regarding the division among the circuits. On the one hand, they acknowledge the circuit split but assert that it will resolve itself. (Opp. 4-6.) On the other hand, they say that the Fourth Circuit's opinion in *DirecTV, Inc. v. Tolson*, 513 F.3d 119 (4th Cir. 2008), is either reconcilable with the Sixth Circuit's opinion or simply wrong. (Opp. 7-9.) Respondents are only partially right.

The circuits are divided on the scope of the comity doctrine in the wake of *Hibbs*. (Pet. 15-21.) Four courts of appeals, including the Sixth Circuit here, take the view that *Hibbs* made the comity doctrine coextensive with the TIA, such that the two apply only where the plaintiff seeks "'to arrest or countermand state tax collection.'" *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005) (quoting *Hibbs*, 542 U.S. at 107 n.9); accord App. 11a (6th Cir.); *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 17-18 (1st Cir. 2009); *Levy v. Pappas*, 510 F.3d 755, 761 (7th Cir. 2007). The Fourth Circuit, by contrast, has held that "the comity principle underlying the TIA is broader than the Act itself, and its scope is not restricted by § 1341," even after *Hibbs*. *DirecTV*, 513 F.3d at 127 (citing *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 110 (1981)). The First and Sixth Circuits have acknowledged but expressly rejected the Fourth Circuit's different view. App. 10a-11a; *Coors Brewing*, 562 F.3d at 17.

The division of authority makes a difference in this case. Under the Fourth Circuit's approach, comity principles would bar Respondents' suit

because it seeks a "heavy-handed" federal court order affecting "intrastate taxation authority." *DirecTV*, 513 F.3d at 127. By the same token, the circuits taking the majority view would have resolved the *DirecTV* dispute differently from the Fourth Circuit, because the plaintiffs in that case did not seek to lessen their own tax burden. *Id.* at 125, 127.

Respondents' effort to reconcile the opinion below with *DirecTV* falls short. Respondents assert that *DirecTV* is on all fours with *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), because in both cases the circuits used the comity doctrine to reject a large class of third-party taxpayers' broad challenge to a state tax regime. (Opp. 7-8.) And Respondents say that their case can be reconciled with *DirecTV* because they request narrower relief that would affect "only four other taxpayers." (Resp. Question Presented.) The Sixth Circuit agreed. App. 14a.

The notion that Respondents seek narrow relief affecting "only four other taxpayers" is wrong on multiple levels. It is premised on the fact that Respondents object to the tax treatment of the natural gas producers, or LDCs, which, by virtue of their natural monopoly and public utility status, are Ohio's sole means of delivering natural gas to Ohio homes. See *General Motors Corp. v. Tracy*, 519 U.S. 278, 284-85 (1997). A challenge to "only" four LDCs' tax treatment, then, is a challenge to *all* LDCs' tax treatment, because those four entities are the only game in town. Respondents' argument is therefore akin to saying that a change to the rules of Major League Baseball will affect "only" two leagues—American and National.

More to the point, Respondents' "only four" argument disregards the fact that they independently challenge the sales tax. See Compl. ¶ 45. And the sales tax is levied on the LDCs' customers—the end consumer—*not* on the LDCs themselves. See Ohio Rev. Code § 5739.03(A) (requiring sales tax to be collected by the natural gas vendors from consumers). Thus, Respondents are asking a federal court to invalidate a sales-tax exemption for, and thereby raise taxes on, *millions* of Ohio taxpayers, not just four.

Respondents also discount the extent to which their suit requires the federal court intrusively to review Ohio's tax and regulatory regime. Respondents make no effort to dispute the Petition's showing that their complaint requires a granular analysis of Ohio tax and public-utilities law. (Pet. 22-23.) And even if Respondents are correct that relief in this case would not necessarily involve extending a tax exemption to Respondents—a dubious proposition, given this Court's precedent (Pet. 26)—they ignore the fact that the district court cannot "level the playing field" without either enjoining the LDCs' substitute tax or taking a scalpel to Ohio's sales tax. (Pet. 27.)

Respondents' arguments lose sight of at least one hundred years of precedent recognizing that comity principles preclude federal court review of state tax law challenges. See, e.g., *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276 (1909). This Court has also made clear that the comity doctrine exists independently of the TIA. See *Fair Assessment*, 454 U.S. at 110; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943).

Because Petitioner seeks nothing more than a proper restoration of that long-existing doctrine, his position would not, as Respondents suggest, "effectively bar any federal court jurisdiction involving a state tax-related matter." (Opp. 6.) This case is precisely the kind to which the comity rule has always applied: a challenge hinging on tax doctrine, not on the Establishment Clause or the like, brought by parties who claim that their *own* tax treatment, not that of third parties, is unconstitutional.

Given the scope and invasiveness of Respondents' requested relief, the Sixth Circuit's decision allowing the suit to proceed eliminates the independent comity bar. Any lip service that the Sixth Circuit and Respondents pay to comity (App. 18a; Opp. 7) cannot be squared either with their approach to this case or with their embrace of the Seventh Circuit's opinion superimposing the TIA's parameters on the comity doctrine. *Levy*, 510 F.3d at 761.

This Court's review is needed to preserve the comity rule.

B. The Sixth Circuit's narrowing of the TIA's scope independently merits the Court's attention.

This case warrants the Court's attention for a second reason: The Sixth Circuit distorted and expanded *Hibbs* to allow federal court review of a state tax law challenge that the TIA precludes, irrespective of the comity doctrine.

To begin with, this case is not *Hibbs*. In determining when the TIA does not apply, the *Hibbs* Court focused on three factors, none of which is

present here: (1) the suit there was brought by third parties who did not seek to reduce their own tax bill; (2) the remedy would not have reduced state revenue; and (3) the suit challenged a tax credit on subject-matter grounds traditionally handled in federal courts. 542 U.S. at 93. Respondents, by contrast, complain about the unevenness of Ohio's tax as applied to them vis-à-vis LDCs. To remedy that purported inequity, the federal court would either have to extend a tax benefit to Respondents (thereby reducing state revenues) or painstakingly alter the way Ohio taxes LDCs. And Respondents' objections derive not from the Establishment Clause or concerns of racial discrimination, but from the administration of tax and regulatory doctrine.

Respondents assert that Petitioner has not identified a decision from another circuit that conflicts with the Sixth Circuit's decision (Opp. 3), but that argument misses the point. The problem with the Sixth Circuit's decision is that it allows a business entity to proceed in federal court with a challenge, under a dormant Commerce Clause or equal protection theory, to the way the State taxes it relative to its competitors. Petitioner is aware of no other case—and Respondents cite none—that has proceeded on the same lines. The Sixth Circuit's decision, then, is not a misapplication of settled law; it is a novel extension of this Court's precedent in a way that warps a federal statute and destabilizes the federal-state balance.

If Respondents are correct, however, and *Hibbs* permits the result here, then that is all the more reason for the Court to clarify that the TIA prevents federal court review of state tax law

challenges that are as disruptive as this one. With respect to a remedy, the Petition demonstrated that one of two things would necessarily occur if Respondents succeed on the merits: either the federal court would extend the challenged tax exemption to Respondents, or it would achieve parity by engaging in detailed tailoring of the way Ohio taxes LDCs. (Pet. 26-28.) Respondents assert that the former is a specious claim, but they ignore this Court's explanation that "extension, rather than nullification," is the default remedy for constitutional claims grounded in unequal treatment. *Califano v. Westcott*, 443 U.S. 76, 89 (1979). Meanwhile, Respondents altogether ignore Petitioner's argument that the federal court could not achieve parity by simply eliminating the exemption, and their silence is deafening. Given the structure of the LDC taxes and the intersection with public-utilities regulations, there could be no simple, nonintrusive fix. The TIA bar therefore applies.

Finally, Respondents cite *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), as an example of Ohio's purported fair-weather federalism (Opp. 9-10), but that case only confirms that review is needed here. Respondents assert that Ohio consented to removal in *Cuno*—like this case, a dormant Commerce Clause challenge to a state tax law—but in fact Ohio simply conceded there that one oddly situated plaintiff "arguably" had standing in the lower federal courts. See Brief for Petitioners, *Wilkins v. Cuno*, No. 04-1724, at 27, 2005 U.S. S. Ct. Briefs Lexis 861, **51. Ohio steadfastly objected to federal jurisdiction for all other parties on standing grounds, and this Court unanimously endorsed that view. *Cuno*, 547 U.S. at 342-46. There is nothing

inconsistent in objecting to federal jurisdiction on one ground (standing) rather than another (TIA or comity).

That is not to say, of course, that Respondents lack an appropriate forum for their complaint. Respondents assert that Ohio has changed the way it regulates natural gas sales, citing both *Tracy*, 519 U.S. 278, and *Columbia Gas Transmission Corp. v. Levin*, 882 N.E.2d 400 (Ohio 2008), cert. denied, 129 S. Ct. 896 (2009). (Opp. 1.) What Respondents overlook is that both of those cases originated *in the Ohio courts*. Respondents do not suggest that the state courts (or this Court) inadequately adjudicated those disputes, nor do they explain why the state courts cannot handle this case as well. Instead, they simply argue that they are entitled to hale the State of Ohio into federal court to undertake a searching examination of the way the State taxes and regulates natural gas sellers. But neither principles of comity nor the TIA permit a federal court to entertain such a challenge.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 09-223

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In the
Supreme Court of the United States

RICHARD A. LEVIN, Tax Commissioner of Ohio,
PETITIONER,

v.

COMMERCE ENERGY, INC., ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ALASKA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, IOWA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did the Court's decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), which addressed the scope of the Tax Injunction Act's bar against federal cases seeking to enjoin the assessment and collection of state taxes, eliminate or narrow the doctrine of comity—applied in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1991)—which more broadly precludes federal jurisdiction over cases that intrude on the administration of state taxation?

2. Do either comity principles or the Tax Injunction Act bar federal jurisdiction over a case in which taxpayers allege, on equal protection and dormant Commerce Clause grounds, that their tax assessments are discriminatory relative to other taxpayers' assessments?

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INTEREST OF THE *AMICI CURIAE*[1]

Acknowledging "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems," *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981), this Court "has long recognized that principles of federalism and comity generally counsel that [federal] courts should adopt a hands-off approach with respect to state tax administration" and, as a result, that challenges to state taxation must be brought in state court if there is an adequate remedy under state law, *Nat'l Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582, 586-587 (1995). In its decision below, the Sixth Circuit altered this historic federal-state balance in matters of state taxation by making available a federal forum for state tax challenges so long as the challengers frame their complaint as contesting a third party's tax liability rather than their own.

The Sixth Circuit's approach both misunderstands this Court's holding in *Hibbs v. Winn*, 542 U.S. 88 (2004), regarding the scope of federal jurisdiction under the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, and, worse, misconstrues a footnote in *Hibbs* to undermine the historically grounded, federalism-based concern for comity in state tax matters. This holding, which is the subject of a circuit split but has become the majority

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[1] Pursuant to Rule 37.2(a), the *amici* States provided notice of their intention to file this brief to counsel of record at least 10 days prior to filing.

view, is of substantial concern to the *amici* States. If it continues to take root, States and their subdivisions will be forced to spend substantial time and money on state tax litigation in the federal courts, even though they have made available adequate remedies under their own laws. Both because comity principles should be applied uniformly throughout the nation and because the prevalence of the Sixth Circuit's view subjects state tax administration to unprecedented federal interference, the *amici* States urge the Court to grant the petition, resolve the circuit split, and restore state courts to their proper role as the principal forum for adjudicating challenges to state taxation.

STATEMENT

1. Respondents, in-state and out-of-state retail natural gas suppliers ("independent marketers" or "IMs") and one of their customers, filed suit alleging that Ohio's laws for taxing natural gas discriminate against interstate commerce and violate equal protection by favoring the IMs' competitors, local natural gas distribution companies ("LDCs"). Pet. App. 4a, 20a. Respondents challenged three exemptions and exclusions Ohio law affords LDCs but not IMs. *Id.* at 4a-5a, 21a.

2. Petitioner filed a motion to dismiss, arguing that the TIA barred respondents' suit in federal court or, in the alternative, that comity required dismissal of respondents' claims. Pet. App. 19a-20a. The district court granted petitioner's motion on comity grounds. *Id.* at 26a-32a.

Before doing so, however, the court rejected petitioner's argument that the TIA barred respondents'

federal lawsuit.[2] In the court's view, *Hibbs* read the TIA to preclude federal jurisdiction only where "state taxpayers seek federal-court orders enabling them to avoid paying taxes." Pet. App. 23a (internal quotations omitted). Because respondents were "not contesting their own tax liability," and granting their requested relief—enjoining enforcement of the exemptions and exclusions that allegedly favor the LDCs—"would increase state tax revenue," the TIA was inapplicable. *Id.* at 24a. On the latter point, the court dismissed as "speculat[ive]" petitioner's suggestion that, if respondents were to obtain their desired injunction, the LDCs might respond by suing to enjoin the imposition of certain taxes as to themselves, thereby raising the specter of a decrease rather than an increase in state tax revenue. *Id.* at 24a-25a n.1.

Regarding comity, the court rejected respondents' argument that *Hibbs* restricted comity's reach "to those cases seeking to stop or countermand state tax collection." Pet. App. 27a. To the contrary, "[t]he scope of federal court deference based on principles of comity is substantially broader than that required under the TIA," extending to suits "seeking to force the collection of additional taxes," which represent "as much of an interference with state tax administration as a suit seeking to enjoin collection of a state tax." *Id.* at 26a, 29a (internal quotations omitted). The court

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[2] The TIA directs federal courts not to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The parties agree that Ohio makes available an adequate state court remedy. Pet. App. 6a n.2.

acknowledged that while respondents had not sought to extend the challenged exemptions and exclusions to IMs—"presumably because [respondents] correctly understood that the TIA expressly bars federal court jurisdiction over such claims"—Ohio could remedy any constitutional violation either by ending the challenged exemptions and exclusions, as respondents requested, or by extending the exemptions to the IMs. *Id.* at 32a. The court "decline[d] to impose its own judgment on the state legislature" by itself determining which of the "two possible remedies" is "appropriate." *Ibid.*

3. The Sixth Circuit reversed. Pet. App. 4a. The court first affirmed the district court's conclusion that the TIA did not foreclose federal jurisdiction. *Id.* at 7a. The court acknowledged that success on respondents' claims "might * * * have *some* negative impact on local revenues" but deemed this insufficient to overcome the rule, purportedly set forth in *Hibbs*, that the TIA "applies only to cases in which state taxpayers seek to avoid paying state taxes where success would operate to reduce the flow of state tax revenue." *Id.* at 8a (internal quotations and brackets omitted; emphasis in original).

The Sixth Circuit held that comity did not bar respondents' federal lawsuit, either. Pet. App. 9a-18a. The court acknowledged a "circuit split" over whether *Hibbs* "limit[ed] an expansive reading of * * * the comity principle's breadth," and embraced the Seventh and Ninth Circuit's view—expressly rejecting the Fourth's—that "comity guts federal jurisdiction only when plaintiffs try to thwart tax collection." *Id.* at 10a, 11a. According to the Sixth Circuit, a contrary conclusion would render the TIA "entirely superfluous," ignore this Court's supposed "directive" in *Hibbs* "that comity strips jurisdiction only when plaintiffs have

sought district-court aid in order to arrest or countermand state tax collection," and "*sub silentio* overrule * * * cases" such as *Hibbs*. *Id.* at 17a-18a.

The court of appeals did not go so far, however, as to adopt the view, endorsed by the Seventh Circuit, that the TIA and comity are fully coextensive and apply only "'[w]hen a plaintiff alleges that the state tax collection or refund process is singling her out for unjust treatment.'" Pet. App. 10a (quoting *Levy v. Pappas*, 510 F.3d 755, 761 (7th Cir. 2007)). Rather, the court held that the comity bar turns on "the degree to which the claims and relief requested would intrude upon a state's power to organize, conduct, and administer its tax scheme." Pet. App. 14a. Because success on respondents' claims would affect "only" Ohio's four natural gas distributors and "a limited class of exemptions" available solely to them, "the suggested intrusion into traditional matters of state taxation here is not significant enough to trigger comity to bar jurisdiction." *Ibid.*

REASONS FOR GRANTING THE PETITION

Applying federalism principles, this Court has held consistently that state tax administration should be protected against federal intrusion. Yet, as the petition explains, Pet. 10-21, and the court below acknowledged, Pet. App. 10-11a, a circuit split has arisen after *Hibbs* over whether a constitutional challenge to state taxation may go forward in federal court merely because the challengers have contested another's tax liability rather than their own—and thus are not expressly "try[ing] to thwart state tax collection," *id.* at 11a. As a result, the five States within the Fourth Circuit currently receive the full benefit of the proper balancing of federal-state

interests, while the twenty States within the First, Sixth, Seventh, and Ninth Circuits do not. This Court's intervention is necessary to ensure that rules of federal jurisdiction over state tax challenges are applied uniformly nationwide.

Equally important, the Court should grant the petition to restore state courts to their proper role as the principal forum for adjudicating state tax matters. The majority view—exemplified by the decision below—limits the comity bar to direct challenges to the public fisc, and ignores federalism's broader concerns, which include preserving the presumption that state courts are well-equipped to resolve questions of federal constitutional law, protecting state officers from being hailed into federal court when relief is available under state law, and preventing plaintiffs from circumventing the States' established rules for adjudicating tax challenges. This approach also channels myriad questions of state law into federal courts, which have no authority to render controlling pronouncements on such issues, and deprives state courts of the opportunity to develop their own legal doctrine. Finally, the majority rule promotes efforts by plaintiffs to shop for their preferred forum through "artful" pleading. For all these reasons, the petition should be granted, and the judgment below should be reversed.

THE SIXTH CIRCUIT'S RULE CONFLICTS WITH HISTORIC PRACTICES AND THREATENS THE INDEPENDENCE OF STATE TAX ADMINISTRATION.

A. Comity Is A "Vital Consideration" And Has Special Force In Matters Of State Tax Administration.

This Court has consistently identified the federalism-based interest in comity as a "vital consideration." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Comity embodies

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Ibid. Thus, comity counsels federal courts, "anxious though [they] may be to vindicate and protect federal rights and federal interests," to "always endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Ibid.*

Proper recognition of comity principles is particularly essential in matters of state tax administration. More than a century ago, this Court recognized that federal interference with the state taxing power jeopardizes the delicate balance of federal-state relations: as the Court then explained, "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of

them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. Chicago*, 78 U.S. 108, 110 (1870). More recently, the Court reaffirmed that "the reasons supporting federal non-interference" in state tax administration remain equally "compelling today," *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 527 (1980), reiterating that "[t]he States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation," *Ark. v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821, 826 (1997) ("*Farm Credit Servs.*"); see also *Fair Assessment*, 454 U.S. at 102-103 ("the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts"). In short, "the federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the Federal Judiciary." *Farm Credit Servs.*, 520 U.S. at 826.

Thus, comity bars federal courts from rendering declaratory judgments in lawsuits challenging the constitutionality of state tax laws, see *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943), or granting damages relief in such cases, see *Fair Assessment*, 454 U.S. at 107. In declining to find federal jurisdiction over these claims, the Court identified broader concerns than merely protecting the public fisc. See *id.* at 108 n.6. First, challenges to state taxation, even if based on the Federal Constitution, "'are likely to turn on questions of state tax law, which * * * are more properly heard in state courts.'" *Ibid.* (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, *J.*, concurring in part and dissenting in

part)). Second, "'[i]f federal * * * relief were available to test state tax assessments, * * * taxpayers might escape the ordinary procedural requirements imposed by state law'" and thus avoid the States' "'established rules'" for the adjudication of tax disputes. *Ibid.* (quoting *Perez*, 401 U.S. at 128 n.17) (Brennan, *J.*, concurring in part and dissenting in part)). Third, successful challenges to state tax systems, even if for damages, require a federal court determination that state law is unconstitutional, thereby "halt[ing] its operation." *Id.* at 115. And fourth and finally, such challenges have the effect of "hal[ing] state officers into federal court." *Ibid.* The Court thus has articulated and enforced "a federal policy against federal adjudication of [this] class of litigation altogether." *Perez*, 401 U.S. at 115 (Brennan, *J.*, concurring in part and dissenting in part).

By allowing respondents' challenge to Ohio's tax laws to go forward in federal court, the Sixth Circuit violated this entrenched policy and upset the delicate balance between States and the federal government on questions of state taxation.

B. The Sixth Circuit's Approach Channels To Federal Court Myriad Issues Of State Law And Deprives State Courts Of The Opportunity To Resolve Federal Constitutional Issues.

The decision below permits challenges to state taxation to proceed in federal court so long as the challengers do not seek openly to "thwart tax collection," Pet. App. 11a, merely by framing their case as a complaint about another's tax liability rather than

their own.[3] This approach creates two unfortunate effects: it forces state authorities to litigate questions of state tax law in federal court, and it deprives state courts of the opportunity to resolve issues of federal constitutional law.

As to the former effect, the Sixth Circuit's decision undermines the States' legitimate interest in interpreting their own law. "It is the state courts which have the first and last word as to the meaning of state statutes." *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952). Thus, "no matter how seasoned the judgment of [a federal] district court may be" on a question of state law, "it cannot escape being a forecast

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[3] In an effort to reconcile the decision below with *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), the Sixth Circuit left open the possibility that comity would bar federal jurisdiction in cases where, although the plaintiffs did not challenge their own tax assessments, "the claims and relief requested" threatened to sufficiently "intrude upon a state's power to organize, conduct, and administer its tax scheme." Pet. App. 14a. The court admitted that it could not provide any guidance as to when this standard might be satisfied, however. See *id.* at 13a ("we cannot make all-encompassing decrees regarding how principles of comity and federalism will always apply; they are merely *principles*") (emphasis in original). And notwithstanding the court's insistence that success on respondents' claims would affect "only" Ohio's four natural gas distributors and "a limited class of exemptions" available solely to them, that the court allowed the case to proceed in federal court even though respondents are seeking to rewrite Ohio's tax laws for the State's entire market for selling natural gas to consumers demonstrates that only in few (if any) cases will "the suggested intrusion into traditional matters of state taxation" be "significant enough to trigger comity to bar jurisdiction." *Id.* at 14a; see also Pet. 21-24.

rather than a determination." *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941). The problems engendered by adjudicating state tax law issues in the federal courts, which lack the power to render controlling pronouncements of state law, are three-fold.

First, routing issues of state law to federal court increases the likelihood that courts will treat similarly situated parties differently. Cf. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594 (1968) (per curiam) (holding that federal court should abstain in favor of state court resolution of issue of state law because "[s]ound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other" parties); *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943) (recognizing that allowing federal courts to adjudicate certain state law claims would cause "[d]elay, misunderstanding of local law, and needless federal conflict with the State policy," and citing instances "where [a] federal court has flatly disagreed with the position later taken by a State court as to State law"). Because a federal court's construction of state law does not bind state courts, "[n]eedless decisions of state law should be avoided [by federal courts] both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (footnote omitted).

Second, federal courts face unique obstacles when addressing state tax matters, which are notoriously intricate, involving myriad distinctions and competing policy considerations. See *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (on equal protection challenge to state tax law, applying "especially deferential" standard of review

to state classifications in recognition of complexity of state taxation schemes); *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 629 (1973) (describing difficulties of assessing Commerce Clause challenge to state tax law, because "for a long time this area of state tax law has been cloudy and complicated"); *Dane v. Jackson*, 256 U.S. 589, 598-599 (1921) ("it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the states for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state Legislatures"). Thus, federal court determinations on issues of state tax law not only are necessarily predictions, they also run the risk of being inaccurate.

Third, the Sixth Circuit's rule interferes with the development of state law because federal courts are less likely to expand the contours of state law to the same extent as state courts. Federal judges view themselves as "*Erie*-bound to apply state law as it currently exists," not to "change that law or adopt innovative theories of recovery," *Solomon v. Walgreen Co.*, 975 F.2d 1086, 1089 (5th Cir. 1992) (per curiam), for it is not "the function of the federal court to expand the existing scope of state law," 19 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction 2d § 4507, at 207 (1996); accord *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1088 (7th Cir. 1990) ("Federal judges are disinclined to make bold departures in areas of the law that we have no responsibility for developing.") (internal quotations omitted). Federal courts thus approach "innovative theories" of state law "charily" and are "extremely cautious about adopting substantive innovation in state law." *Combs v. Int'l Ins. Co.*, 354

F.3d 568, 578 (6th Cir. 2004) (internal quotations omitted). By routing myriad issues of state tax law to federal court, the Sixth Circuit's approach slows the development of state law in an area at the core of state sovereignty.

Not only does the Sixth Circuit's expansive approach to federal jurisdiction channel questions of state tax law to federal court, but it also deprives state courts of the opportunity to resolve issues of federal constitutional law. State courts "'have the solemn responsibility equally with the federal courts' to safeguard constitutional rights." *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977) (quoting *Steffel v. Thompson*, 415 U.S. 452, 460-461 (1974)). Indeed, historically, "'state courts provided the only forum for vindicating many important federal claims.'" *Nat'l Private Truck*, 515 U.S. at 588 (quoting *Palmore v. United States*, 411 U.S. 389, 401 (1973)). Consistent with comity, this Court accordingly has "refuse[d]" to "assume[e] that state judges will not be faithful to their constitutional responsibilities." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975); accord *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.") (emphasis in original). By preventing States from "not only 'effectuating [their] substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies,'" *Trainor*, 431 U.S. at 443 (quoting *Huffman*, 420 U.S. at 604), the decision below undermines the

state courts' role as capable adjudicators of federal constitutional rights.

C. The Sixth Circuit's Approach Promotes "Artful Pleading" To Obtain Federal Court Jurisdiction.

The rule adopted below not only conflicts with comity's respect for state courts as principle arbitrators of issues of state law and competent adjudicators of federal constitutional claims, but it also runs afoul of the prohibition on obtaining federal jurisdiction through "artful pleading." The Sixth Circuit's holding that state tax challengers are entitled to federal jurisdiction so long as they do not expressly request "district court aid in order to arrest or countermand state tax collection," Pet. App. 9a (internal quotations omitted), encourages plaintiffs seeking what they perceive as a more favorable federal forum to characterize their complaint as a demand for an increase in another's tax liability rather than a decrease in their own.

This Court has long refused to sustain efforts to manipulate federal jurisdiction "'by the simple expedient of putting a different label on [the] pleadings.'" *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973)) (brackets in original). For example, the Court, applying the "well-pleaded complaint rule," has rejected attempts to bring a state law suit within federal jurisdiction by anticipating a defense based on federal law. See, *e.g.*, *Franchise Tax Bd. v. Constr'n Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-674 (1950). Instead, "[s]uch a defense is properly made in the state proceedings, and the state court's disposition of it is

subject to this Court's ultimate review." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 478 (1998). To proceed otherwise would "[n]ot only * * * unduly swell the volume of litigation in the District Courts," but "also embarrass those courts—and this Court on potential review—in that matters of local law may often be involved, and the District Courts may either have to decide doubtful questions of State law or hold cases pending disposition of such State issues by State courts." *Skelly Oil*, 339 U.S. 667 at 673-674. In short, the well-pleaded complaint rule "avoid[s] automatically a number of potentially serious federal-state conflicts." *Franchise Tax Bd.*, 463 U.S. at 9-10.

The decision below contravenes this federalism-based prohibition against artful pleading. Although respondents framed their claim to seek the elimination of LDC tax exemptions and exclusions, they just as easily could have sought to extend the credits to the IMs, and the complaint does not preclude such relief. See Pet. 8 (requesting "[s]uch other relief to which plaintiffs are entitled"). Respondents declined to characterize their complaint in this way "presumably because they correctly understood that the TIA expressly bars federal court jurisdiction over such claims." Pet. App. 32a. But if respondents were to succeed on the merits, the most likely outcome would be the exemption of IMs from the complained-of taxes, not a termination of the exemptions and exclusions to the LDCs. See Pet. 26. Thus, by allowing respondents' suit to proceed in federal court, the Sixth Circuit endorsed their use of drafting sleight-of-hand to obtain federal court review of a state tax challenge that properly belongs in state court.

The ease with which respondents were able artfully to plead themselves into federal court under the Sixth Circuit's rule is ripe for replication, should that approach continue to take root. For example, in *Department of Revenue v. Davis*, 128 S. Ct. 1801 (2008) ("*Davis*"), this Court rejected a dormant Commerce Clause challenge to a Kentucky law exempting from state income taxes any interest earned on bonds issued by the State or its political subdivisions, while taxing bond interest from other States. See *id.* at 1804. The plaintiffs, who pursued their claim through the Kentucky courts, sought to extend the exemption and requested a refund of taxes they had paid on income earned from out-of-state bonds. See *id.* at 1807. Had the plaintiffs instead sought to enjoin the exemption, however, they could have obtained federal jurisdiction under the Sixth Circuit's approach. And although there is no persuasive reason why the latter complaint should go forward in federal court when the former cannot, that is the result of the majority rule that the decision below adopts.

Similarly, in *Associated Grocers, Inc. v. Washington*, 787 P.2d 22 (Wash. 1990), the Washington Supreme Court, after undertaking a careful analysis of state law, held that a Washington law affording an exemption from that State's business and occupation tax to grocery distributors but not wholesalers violated the Equal Protection Clause of the Federal Constitution. See *id.* at 23-26. Although the plaintiff wholesalers had sought an extension of the exemption and a refund of taxes paid, the court held that under Washington law "the proper remedy consists solely of striking the offending tax exemption." *Id.* at 23. The court's award, which would have the effect of increasing Washington's tax

revenues, obviates any doubt that, had the plaintiffs cast their complaint differently, they could have (in the Sixth Circuit's view) obtained federal jurisdiction over substantial questions of state tax law.

And in *Panhandle Producers & Royalty Owners Association v. Oklahoma Tax Commission*, 162 P.3d 960 (Okla. Civ. App. 2007), the plaintiffs sought to enjoin as violating, *inter alia*, the Equal Protection and dormant Commerce Clauses, an Oklahoma statute requiring withholding of income taxes due on certain royalty payments to non-residents, while exempting Oklahoma residents from the withholding requirement. See *id.* at 962-963. The suit was originally filed in federal district court but was dismissed under the TIA. After refiling in state court, the plaintiffs argued for the first time that the alleged violation could be remedied by amending the statute "to require taxes on royalties to be withheld from payments to all interest owners, regardless of residence." *Id.* at 966. Had the plaintiffs sought this relief earlier, the federal district court would have been required to hear their claims under the majority approach.

The same is true of any state court case in which the plaintiffs argued that their tax bill violated federal law because it was excessive when compared to a third party's. Were these plaintiffs merely to recharacterize their complaint to focus on others' tax assessments rather than their own, their case could have gone forward in federal district court under the Sixth Circuit's approach. And a federal court would have had to undertake an invasive (but ultimately nonbinding) analysis of a State's taxing scheme that is properly reserved to state courts in the first instance. The

prohibition against artful pleading thus provides an additional reason to reject the Sixth Circuit's rule.

D. The Sixth Circuit's Approach Is Not Required By Either The TIA Or *Hibbs*.

The Sixth Circuit relied on *Hibbs* to hold that comity's reach is essentially coextensive with that of the TIA and that the TIA precludes federal jurisdiction only where plaintiffs expressly cast their complaint as a challenge to their own tax bill. See Pet. App. 7a, 11a; see also *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 18 (1st Cir. 2009) (in light of *Hibbs*, abrogating more expansive view of comity in *U.S. Brewers Ass'n v. Cesar Perez*, 592 F.2d 1212 (1st Cir. 1979)). But *Hibbs* does not compel the result below.

First, before *Hibbs*, this Court made clear that the interests protected by comity are not coextensive with those safeguarded by the TIA. *Hibbs*, which addressed comity in a footnote and did not purport to overrule decades of jurisprudence protecting "the delicate balance between the federal authority and state governments, and the concomitant respect that should be accorded state tax laws in federal court," *Fair Assessment*, 454 U.S. at 108, does not hold otherwise.

The TIA embodies but "one manifestation" of the traditional "aversion" to federal-court interference in state tax administration. *Nat'l Private Truck Council*, 515 U.S. at 586. While the TIA "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations," only the "last consideration" "was the principle motivating force behind the Act." *Rosewell*, 450 U.S. at 522 (internal quotations omitted). The TIA "was first and foremost a vehicle to limit

drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Ibid.*; accord *Fair Assessment*, 454 U.S. at 183

Because Congress did not "intend[] that federal-court deference in state tax matters be limited to the actions enumerated in [the TIA]," *Fair Assessment*, 454 U.S. at 183, the TIA is "best understood as but a partial codification of the federal reluctance to interfere with state taxation," *Nat'l Private Truck Council*, 515 U.S. at 590; accord *Rosewell*, 450 U.S. at 525 (rejecting view that with the TIA "every wrinkle of federal equity practice was codified, intact, by Congress"). The TIA's enactment therefore was not "an indication of disapproval of the policy of federal equity courts, or a mandatory withdrawal from them of their traditional power to decline jurisdiction in the exercise of their discretion." *Great Lakes*, 319 U.S. at 301; accord *Fair Assessment*, 454 U.S. at 183 ("the principle of comity which predated the Act was not restricted by its passage"). As a result, "even where the [TIA] would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief." *Rosewell*, 450 U.S. at 525 n.33.

These decisions dispel the Sixth Circuit's concern that a "broad view of comity would render * * * [the TIA] effectively superfluous." Pet. App. 11a. There is no reason why Congress would not have sought to codify certain aspects of existing federal court practice to respond to the problems that legislators deemed most

urgent.[4] And even if the TIA cannot be understood as but a partial codification of comity principles, it still would not be "superfluous." The TIA "limit[s] drastically federal district court *jurisdiction* to interfere with so important a local concern as the collection of taxes." *Rosewell*, 450 U.S. at 522 (emphasis added). The TIA does not alter the federal courts' historic ability to refrain from hearing challenges to state taxation that stand to increase tax revenues but nevertheless implicate federalism concerns.

Second, even if, under the circumstances presented, *Hibbs* limited the reach of both the TIA and comity to cases in which plaintiffs frame their complaint as a challenge to their own tax liability, *Hibbs* is distinguishable from this case in several ways.

Central to comity is federalism's respect for the role of state courts as principal arbiters of state law. See *supra* pp. 8, 10-13. This Court in *Hibbs* acknowledged this interest, see 542 U.S. at 106 n.8 (describing States' "vital" interest in their courts' "authority * * * to determine what state law means"), but noted that it was not implicated because there was "no disagreement as to the meaning of" state law and thus no call for the federal district court "to interpret any state law," *ibid.*;

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[4] Congress enacted the TIA to eliminate disparities between those taxpayers who could obtain injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and those required to proceed in state courts, which generally require taxpayers to pay first and litigate later. See *Rosewell*, 450 U.S. at 522 n.29. Congress was also concerned that taxpayers, with the aid of a federal injunction, could withhold large sums, thereby disrupting government finances. See *id.* at 526.

see also *Fair Assessment*, 454 U.S. at 107 n.4. (declining to decide whether comity would bar claim for damages that "requires no scrutiny whatever of state tax assessment practices"). The Court did not suggest that the comity bar would not apply where, as here, see Pet. 7 & n.1, 22-23, the plaintiffs' constitutional claims are intertwined with disputed issues of state law.

Hibbs does not compel a departure from the federalism-based prohibition against artful pleading, either, because the plaintiffs there could not have recast their complaint as a suit to contest their own tax liability. Success on the Establishment Clause claims could not be remedied other than through the relief the plaintiffs requested—an injunction against the Arizona law authorizing tax credits for charitable contributions made by Arizona taxpayers to "school tuition organizations," as well as the return to the State's general fund of monies already distributed to (but not yet spent by) the STOs. See *Winn v. Killian*, 307 F.3d 1011, 1014 (9th Cir. 2002). Under no imaginable circumstance could the suit have a "negative impact on tax collection," *Hibbs*, 542 U.S. at 94, and therefore this Court did not decide whether federal jurisdiction exists where the plaintiffs could have but did not directly challenge their own tax liability.

Finally, crucial to *Hibbs*' conclusion that the TIA did not bar federal jurisdiction was the fact that "in decisions spanning a near half century" federal courts had adjudicated challenges to state tax credits as racially discriminatory. 542 U.S. at 93. By contrast, claims like respondents'—dormant Commerce Clause and Equal Protection challenges to a State's allegedly favorable tax treatment of business competitors—have almost invariably been adjudicated in state courts, with

ultimate review by this Court where appropriate. See, *e.g.*, *Davis*, *supra* p. 16; *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 285-286 (1997) (on certiorari review from state court adjudication of dormant Commerce Clause and equal protection challenges to Ohio's sales and use tax exemption for LDCs); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 239-240 (1987) (same for dormant Commerce Clause challenge to Washington's multiple activities tax exemption for local manufacturers); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 265-267 (1984) (same for dormant Commerce Clause and equal protection challenges to Hawaii's excise tax exemption for locally produced liquors).

Moreover, this Court has taken pains to ensure that state courts have an opportunity to address in the first instance all issues raised by such challenges. For example, in *Tyler Pipe*, the Court held invalid the Washington tax exemption but declined to "take it upon itself in this complex area of state tax structures to determine how to apply its holding." 483 U.S. at 252. The Court accordingly remanded the case to the Washington Supreme Court for a determination "in the first instance" whether the adverse decision should be applied retroactively. *Id.* at 253; see also *Bacchus*, 468 U.S. at 277 (after finding state tax exemption invalid, remanding to state supreme court to address "refund issues" "in the first instance" because, *inter alia*, "the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law").

* * *

This Court should grant certiorari to resolve a well-defined split in authority, address the scope of

federal jurisdiction over challenges to state tax administration, and make clear that *Hibbs* did not jettison the Court's long-settled deference to state courts as the principle forum for adjudicating state tax challenges, respect for the state courts' ability to resolve federal constitutional claims, and resistence to efforts at manipulating federal jurisdiction through "artful pleading."

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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JOINT APPENDIX

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(6)

No. 09-223

Supreme Court, U.S.
FILED
DEC 23 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

RICHARD A. LEVIN, Tax Commissioner of Ohio
Petitioner,

v.

COMMERCE ENERGY, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED AUGUST 20, 2009
CERTIORARI GRANTED NOVEMBER 2, 2009

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:07-cv-151
Filed: February 26, 2007

COMMERCE ENERGY, INC. dba COMMERCE ENERGY OF OHIO, INC.
600 Anton Boulevard, Suite 2000
Costa Mesa, CA 92626

and

INTERSTATE GAS SUPPLY, INC.
5020 Bradenton Avenue
Dublin, Ohio 43017

and

GREGORY SLONE
6123 Sugar Maple Dr.
Westerville, OH 43082

Plaintiffs,

vs.

RICHARD A. LEVIN, in his official capacity as Ohio Tax Commissioner
30 E. Broad St., Floor 22
Columbus, Ohio 43215

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Commerce Energy, Inc., dba Commerce Energy of Ohio, Inc., Interstate Gas

Supply, Inc., and Gregory Slone, state as follows for their Complaint for Declaratory and Injunctive Relief against Defendant, Ohio Tax Commissioner Richard A. Levin, in his official capacity:

Parties

1. Plaintiff Commerce Energy, Inc., dba Commerce Energy of Ohio, Inc. ("Commerce Energy") is a California corporation with its principal place of business located in Costa Mesa, California. Commerce Energy is a "retail natural gas supplier" (hereinafter "Retail Supplier") as that term is defined in R.C. 4929.01(N), in the business of marketing and selling natural gas to Ohio industrial, commercial, and residential consumers as part of Ohio's competitive retail natural gas service program (*i.e.* Ohio's "Consumer Choice" program) as set forth in R.C. Chapter 4929. Commerce Energy does not qualify (and cannot qualify) as a "natural gas company" as that term is defined in R.C. 5727.01(D)(4) and R.C. 4929.01(G).

2. Plaintiff Interstate Gas Supply, Inc. ("IGS") is an Ohio corporation with its principal place of business located in Dublin, Ohio. IGS is a Retail Supplier, in the business of marketing and selling natural gas to Ohio industrial, commercial, and residential consumers as part of Ohio's Consumer Choice program. IGS does not qualify (and cannot qualify) as a "natural gas company" as that term is defined in R.C. 5727.01(D)(4) and R.C. 4929.01(G).

3. Plaintiff, Gregory Slone, is a citizen of Ohio residing at 6123 Sugar Maple Dr., Westerville, OH 43082. Since November 15, 1999 to the present,

Slone has purchased natural gas from IGS pursuant to Ohio's Consumer Choice program.

4. Neither Commerce Energy nor IGS own or operate any facilities in Ohio for purposes of delivering or transporting natural gas to consumers.

5. Defendant Richard A. Levin is the Tax Commissioner of the State of Ohio. The duties and responsibilities of the Tax Commissioner include ensuring that the state sales and use taxes, gross receipts taxes, and commercial activities taxes are enforced and collected in accordance with the law. R.C. 5703.01, 5703.05.

Jurisdiction and Venue

6. This Court has original subject matter jurisdiction over this action under 28 U.S.C. §§ 1331, 2201, and 2202 because it arises under the Constitution of the United States, and seeks declaratory and injunctive relief.

7. Venue over this complaint is proper under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district and because the defendant resides in this judicial district and the defendant is a citizen of Ohio.

Background

The Traditional Natural Gas Market.

8. Natural gas is the energy source most Ohioans use to heat their homes. Natural gas also is used extensively in the state as a source of energy and power by industrial and commercial businesses. Approximately 90 percent of the natural gas used in

Ohio comes from out of state, and approximately 10 percent comes from private wells within the state.

9. Historically, a local natural gas distribution company ("LDC") provided two primary, yet distinct products that, due to the monopoly status of the LDC, were commonly viewed as one "bundled" product. The "bundled product" historically offered by the LDC was (a) the local distribution product, which involved the owning, operating, and managing intrastate pipeline distribution facilities (either directly or through affiliated entities) for the purpose of moving natural gas from intra and interstate sources into local distribution facilities for the ultimate delivery to the end use customers in Ohio (i.e., the "local distribution product"); and (b) the procurement and provision of natural gas for consumption by end-use customers within the LDC's distribution territory within Ohio (i.e., the "commodity product").

The *GM v. Tracy*, 519 U.S. 278 (1997) Decision

10. Beginning in the 1970s, large industrial consumers in Ohio were given the opportunity to transport natural gas directly to their facilities rather than purchase such natural gas from the LDC.

11. Beginning in the 1980s, large and mid-sized industrial consumers were given the opportunity to purchase natural gas directly from suppliers rather than from LDCs. Under that program, independent gas marketers obtained natural gas from producers and arranged to transport it over the national pipeline network and

LDC network to the industrial end-user, for which it paid a fee.

12. Marketers did not hold themselves out to the public to sell natural gas, but negotiated individual contracts with specific large industrial consumers. LDCs continued to service all residential and the vast majority of business consumers in their area under the traditional "bundled" approach.

13. In 1997, in *GM v. Tracy*, 519 U.S. 278, the United States Supreme Court found that the noncompetitive bundled gas product sold by the PUCO-regulated LDCs was different from the marketer's unbundled gas sales based on the premise that the LDCs' bundled product served a core market, typified by residential customers to whom stability of rate and supply was important, that was neither susceptible to competition by interstate sellers nor likely to be served except by the regulated natural gas monopolies.

14. At the time *Tracy* was decided, the regulatory statutes did not permit a competitive marketplace for the residential "captive" market. As a result, the *Tracy* Court ruled that the two enterprises (LDCs and natural gas marketers) should not be considered "similarly situated" for constitutional purposes. Therefore, GM could not raise a facial discrimination claim under the dormant commerce clause of the United States Constitution based upon the exemption of LDCs from the sales and use taxes imposed by the State of Ohio on sales of natural gas by marketers.

Ohio's "Choice" Program for Natural Gas.

15. Since the *Tracy* decision, the natural gas market in Ohio has changed significantly, and the factual underpinnings for that decision no longer exist.

16. As a result of the development first of large volume transportation or "self-help" programs and later through small volume transportation programs, the products offered by the LDC became divided into two identifiable products. In other words, the local distribution product became "unbundled" from the commodity product.

17. In 1998, LDCs, through pilot programs, began to voluntarily make available to small commercial and residential customers the option of purchasing natural gas from alternative suppliers.

18. Most significantly, in 2001, House Bill 9 ("HB 9") of the 124th General Assembly, was enacted and became effective June 26, 2001. HB 9 firmly established a State of Ohio policy to "[p]romote the availability of *unbundled and comparable natural gas services and goods* that provide wholesale and retail consumers with the supplier, price, terms, conditions, and quantity options they elect to meet their respective needs [and to] [p]romote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the election of those supplies and suppliers[.]" Ohio Revised Code §4929.02(A)(2)&(3), emphasis added.

19. With the legislative mandate established through HB 9, the availability of the Consumer Choice program for natural gas purchases

in the state of Ohio for residential and smaller commercial consumers was codified and greatly expanded. In addition, the distinction between the LDCs' distribution role and their commodity function role as well as the comparable nature of the commodity product offering of the LDCs and Retail Suppliers became firmly established.

20. Today in Ohio, while the LDCs retain monopoly control over the local distribution product, certain LDCs compete directly with Retail Suppliers such as Plaintiffs Commerce Energy and IGS for the commodity product business of industrial, commercial and residential consumers throughout the four largest LDC distribution territories in Ohio, which serve all major metropolitan areas throughout Ohio, and the vast majority of residential consumers in the State. There is no longer a core market of captive customers for the four major LDCs in Ohio.

21. Ohio's Consumer Choice program applies where the LDC services at least 15,000 customers. R.C. 4929.29. Currently, Ohio's Consumer Choice program applies in the areas serviced by the following larger LDCs: Columbia Gas of Ohio, Inc., Dominion East Ohio, Duke Energy Ohio (formerly Cincinnati Gas and Electric Company), and Vectren Energy Delivery of Ohio (hereinafter collectively, "Choice LDCs"). The Choice LDCs serve all major metropolitan areas throughout Ohio and the vast majority of residential consumers in the State.

22. Where Ohio's Consumer Choice program applies, Choice LDCs and Retail Suppliers compete with each other in the sale of the natural

gas commodity to the same consumers. All consumers within the applicable Choice LDC area have the option of buying their natural gas from the Choice LDC or a Retail Supplier, such as Commerce Energy and IGS.

23. Choice LDCs continue to own and operate (either directly or through affiliated business entities) the local network of distribution pipelines and continue to ensure that natural gas is delivered to consumers regardless of from whom the gas itself is purchased, for which service they receive a fee. Because natural gas is fungible and moves through common pipelines, consumers of each particular Retail Supplier do not receive the exact natural gas placed into the distribution system by the Retail Supplier. Each Retail Supplier is responsible for ensuring that enough natural gas is supplied to the relevant distribution network that supplies the Retail Supplier's customers. Retail Suppliers must make up for any shortfalls during the relevant period of time by purchasing excess natural gas placed in the network by other Retail Suppliers or from the Choice LDC itself.

24. Residential natural gas consumers of Choice LDCs continue to receive (and the consumer pays) a single monthly bill from the Choice LDC, regardless of whether or not the consumer buys natural gas from the Choice LDC or from a Retail Supplier. If a consumer purchases natural gas from a Retail Supplier, the consumer's bill separately identifies the costs (including the applicable sales tax) owed the Retail Supplier for the "gas supply costs" of the natural gas itself (which is remitted by

the Choice LDC to the Retail Supplier). The difference between the "gas supply costs" and the monthly total bill is the amount charged by the Choice LDC for the delivery services, other associated fees approved by the PUCO, and applicable taxes.

25. Larger natural gas customers may also receive a single bill from the Choice LDC just like a residential consumer, or in some circumstances, may receive one bill from a Retail Supplier for the cost of the natural gas and one from the Choice LDC for the delivery charges. Also, a single bill can be rendered by the Retail Supplier who collects and remits the delivery charges and associated fees/taxes to the applicable Choice LDC.

26. Retail Suppliers, like LDCs, are subject to PUCO oversight and review with respect to commodity services provided. Retail Suppliers must be certified biennially by the PUCO. R.C. 4949.20. Retail Suppliers must supply the PUCO with information regarding its managerial, technical, and financial capabilities to provide the natural gas service and must supply reasonable financial assurances sufficient to protect customers and LDCs from default. *Id.* The PUCO may suspend, rescind, or conditionally rescind certification if the PUCO determines, after reasonable notice and opportunity for hearing, that the Retail Supplier has failed to comply with any applicable certification standard.

27. Pursuant to the mandate of R.C. 4929.22, the PUCO has adopted administrative rules specifying the necessary minimum service requirements of a Retail Supplier regarding the

marketing, solicitation, sale, and provision of competitive retail natural gas service, which rules provide numerous consumer protections including, but not limited to: mandatory contract terms and disclosures, minimum content of customer bills, disconnection and service termination requirements, and minimum service quality, safety, and reliability standards. R.C. 4929.22; *See* OAC Chapters 4901:1-27 & 4901:1-49. The Administrative Rules are intended to and do provide consumers with the same level of protection and confidence in the supply of their natural gas as would be the case if such supply was provided by the Choice LDC. The adoption of the Administrative Rules provides assurance that Retail Suppliers providing commodity services in Ohio will not jeopardize service to the residential and small commercial market.

28. Retail Suppliers must submit annual reports to the PUCO to disclose, among other things, the annual receipts and sales of the Retail Suppliers. R.C. 4929.23; OAC Chapter 4901:1-30

29. The PUCO has jurisdiction over complaints filed by persons against Retail Suppliers. R.C. 4929.24

30. Through an annual assessment mechanism, Retail Suppliers share with all utilities, including LDCs, in paying the expenses and costs for the PUCO and Ohio Consumer's Counsel based upon a pro-rata share of intrastate gross receipts of the Retail Supplier. R.C. 4905.10.

31. Retail Suppliers who are accepting new customers must market to all the same customers

serviced by the relevant Choice LDC on an equal basis.

32. Retail Suppliers and LDCs, including all Choice LDCs, are subject to the same rules and regulations concerning the termination of service to residential customers. R.C. 4929.22(D)

33. While Choice LDCs own and operate (either directly or through affiliated business entities) the local network of distribution pipelines in a particular geographical area within Ohio, Retail Suppliers are both in-state and out-of-state corporations, none of which own any facilities in Ohio for purposes of distributing natural gas to consumers. In excess of one-half of the Retail Suppliers selling natural gas to residential consumers in Ohio are businesses which have their principal place of business outside of Ohio.

34. Today in Ohio, there is no longer a distinction between the commodity product offered by the Choice LDCs and the commodity product offered by the Retail Suppliers. Competition in the Choice LDC territories between the Choice LDCs and Retail Suppliers is and has been significant since 2001, and significant percentages of residential consumers have chosen a Retail Supplier for commodity services.

Ohio's Discriminatory Tax Structure Against Sales of Natural Gas by Non-LDCs.

35. Ohio's overall tax structure involving sales of natural gas to consumers in Ohio discriminates against Retail Suppliers (including

Plaintiffs Commerce Energy and IGS), many of whom are out-of-state businesses (including Plaintiff Commerce Energy), and discriminates against customers of Retail Suppliers, including Plaintiff Sloan, all in favor of the Choice LDCs, all of which are in-state businesses, and their natural gas purchasing customers.

36. When, in 1999, the Ohio General Assembly unbundled the electric commodity from its delivery and authorized competitive retail electric service in Ohio through enactment of Am.Sub. S. B. 3, it included in that legislation multiple revisions to the Ohio tax code which, inter alia, equalized the amount of tax paid by retail electric consumers regardless of the supplier of the electric commodity.

37. However, when the Ohio General Assembly enacted H.B. 9 in 2001 unbundling the natural gas commodity and authorizing competition between Retail Suppliers and LDCs for that commodity, it failed to include provisions equalizing the tax paid by purchasers from Retail Suppliers and the tax paid by purchasers from LDCs.

38. The State of Ohio has failed to remedy the discriminatory and unconstitutional tax structure set forth in this complaint since enactment of H.B. 9 and instead has exacerbated the tax inequity through enactment of the commercial activity tax described below.

39. The failure of the State of Ohio to legislatively remedy its discriminatory and unconstitutional tax structure as it applies to Retail Suppliers and their customers compels Plaintiffs to bring this action in this Court for relief under

Article 1, Section 8, clause 3 (Commerce Clause) and the Fourteenth Amendment (Equal Protection Clause) of the United States Constitution.

Sales and Use Tax Discrimination

40. Ohio's sales and use tax (for simplicity sake, collectively referred to herein as a "sales tax") discriminates against sales of natural gas by Retail Suppliers and in favor of sales by Choice LDCs.

41. Effective July 1, 2005, Ohio's statewide sales tax is 5.5 percent. R.C. 5739.02; R.C. 5739.025, R.C. 5741.02 In addition to the statewide 5.5% sales tax, Ohio law also allows county governments to add a combined local "piggyback" sales tax of up to an additional 3% on the statewide rate for sales or uses in their respective counties. See R.C. 5739.021, 5739.023, 5739.025, 5739.026, 5741.021, 5741.022, 5741.023. Attached hereto as Exhibit A, and incorporated by reference, is a map and chart showing the current total state and local sales tax rates by county in Ohio. In 38 of Ohio's 88 counties, the total sales tax rate is at least 7%.

42. Retail Suppliers must charge and collect the statewide sales and relevant county piggyback sales tax on all sales of natural gas to consumers in Ohio. Thus, for example, sales by Retail Suppliers to consumers in Cuyahoga County must include a 7.5% sales tax on the transaction, sales to consumers in Franklin County must include a 6.75% sales tax on the transaction, and sales to consumers in Hamilton County must include a 6.5% sales tax on the transaction.

43. Ohio law exempts all sales of natural gas by "natural gas companies" from the state and county piggyback sales and use taxes. *See* R.C. 5739.02(B)(7), .021(E), .023(G), & .026(F); R.C. 5741.02(C), .021(A), .022(A), & .023(A). Rather, "natural gas companies" pay a gross receipts excise tax ("GRT"), which is included in the rate natural gas companies charge its consumers for natural gas. R.C. 5727.24 The rate for the gross receipts tax is only 4.75% of the sale price of the natural gas. *Id.* The effective rate of the gross receipts tax is 4.99%.

44. Only LDCs, including all of the Choice LDCs, qualify as being a natural gas company under applicable Ohio law, and Retail Suppliers are specifically precluded from qualifying as a natural gas company. R.C. 5727.01(D)(4).

45. Thus, while consumers who purchase their natural gas from a Choice LDC pay a 4.75% gross receipts tax on their purchases of natural gas, consumers who purchase their natural gas from a Retail Supplier must pay a minimum 6% and maximum 7.5% sales tax (depending on the county) on their purchases.

46. The differing treatment between Retail Suppliers and Choice LDCs when it comes to the sales tax is exacerbated in those instances where the Retail Supplier includes the Choice LDC charges on the Retail Supplier's invoice to the customer. In such situations, the gross receipts tax is incorporated into the amount billed by a Retail Supplier on behalf of the Choice LDC. In addition, however, the State of Ohio requires that the Retail Supplier charge the applicable sales tax on the total amount billed,

including the Choice LDC charges that already incorporate the gross receipts tax. This subjects the Retail Supplier customer to double taxation (the Choice LDC gross receipts tax and the sales tax) on the Choice LDC portion of the bill simply because the Choice LDC charge is included on a Retail Supplier's invoice. No such similar double taxation occurs when a Retail Supplier's charges are billed by the Choice LDC.

47. Natural gas consumers are very sensitive to prices and view total delivered cost as a key factor in their choice of seller. In fact, the PUCO publishes "apples to apples" comparison charts and calculation forms (a representative sample is attached and incorporated herein at Exhibit B), which specifically encourage consumers to include the effect of sales tax on purchases from Retail Suppliers when deciding whether to select a Retail Supplier or a Choice LDC.

48. The exemption from the sales tax for sales made by a Choice LDC (at least an exemption over and above what is paid pursuant to the gross receipts tax) discriminates against interstate commerce by providing an exemption that benefits only local natural gas companies, including the Choice LDCs.

Commercial Activities Tax Discrimination

49. Effective July 1, 2005, Ohio imposed a new commercial activities tax ("CAT") on persons that do business in Ohio. R.C. 5751.02. The CAT is imposed on taxable gross receipts at a flat rate of $150 for the first million dollars of "taxable gross receipts" and at the rate of two and sixth tenth mills

(.0026) per dollar of taxable gross receipts above one million dollars. R.C. 5751.03. "Taxable gross receipts" means gross receipts situsedto this state under R.C. 5751.033. R.C. 5751.01(G). "Gross receipts" means the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person. R.C. 5751.01(F).

50. The gross amount received by Retail Suppliers from sales of natural gas in Ohio are included in the calculation of taxable gross receipts and are subject to the CAT, subject to certain applicable exemptions.

51. A person subject to the CAT may include in the price charged for a good or service an amount sufficient to recover the CAT. The CAT, however, may not be separately billed or invoiced to the consumer. R.C. 5751.02(B).

52. Ohio law excludes LDCs, and thus all Choice LDCs, from the imposition of the CAT. R.C. 5751.01(E)(2).

53. The exclusion of LDCs from the CAT imposes an additional tax on the sales of natural gas in Ohio by Retail Suppliers that is not imposed on the sales of natural gas by LDCs. The exclusion of LDCs from the CAT discriminates against interstate commerce and in favor of in-state LDCs.

Exclusion From the GRT Tax for Inter-LDC Transactions.

54. During certain periods of time, customers of Retail Suppliers will demand more

natural gas than was anticipated by the Retail Supplier, and the actual use by the customers of a particular Retail Supplier may exceed the amount of natural gas that the Retail Supplier placed into the distribution network(s) servicing its customers. When that happens, the Choice LDC continues to supply natural gas to the Retail Supplier's customers, and the Retail Supplier must purchase the amount of the shortage from either another Retail Supplier that has excess capacity in that network or, if no such excess capacity exists, from the Choice LDC itself.

55. In addition, when a Retail Supplier obtains new customers that were previously served by a Choice LDC, the Retail Supplier is often required to buy from the Choice LDC certain quantities of natural gas supply assets sufficient to satisfy the new customers' estimated needs for an applicable period of time as directed by the Choice LDC.

56. When a Retail Supplier purchases natural gas from the Choice LDC, that transaction is subject to the gross receipts tax, and the Retail Supplier pays the gross receipts tax to the Choice LDC. Thus, sales of natural gas by Retail Suppliers that are purchased from a Choice LDC include both a sales tax (paid by the consumer) and a gross receipts tax (paid by the Retail Supplier).

57. LDCs also purchase natural gas from other LDCs in order to satisfy shortages in a particular distribution network. Ohio law exempts sales of natural gas between LDCs from the gross receipts tax. R.C. 5727.33(B)(5).

58. The exemption from the gross receipts tax for inter-LDC sales of natural gas imposes an additional tax on some sales of natural gas by Retail Suppliers (those purchased by the Retail Suppliers from an LDC) that are never imposed on any sales of natural gas by Choice LDCs.

Claim I: Commerce Clause of the United States Constitution

59. Plaintiffs incorporate by reference the above paragraphs as if fully set forth herein.

60. The exemption and/or exclusion from imposition of the sales tax on sales of natural gas by LDCs (R.C. 5739.02(B)(7), .021(E), .023(G), & .026(F); R.C. 5741.02(C), .021(A), .022(A), & .023(A)), the exemption and/or exclusion from the CAT for LDCs (R.C. 5751.01(E)(2)), and the exemption and/or exclusion from the gross receipts tax for inter-LDC sales of natural gas (R.C. 5727.33(B)(5)), either individually or together, discriminate against interstate commerce by favoring some in-state businesses (Choice LDCs) over all out-of-state businesses.

61. The exemptions and/or exclusions identified above, either individually or together, violate the "dormant" or "negative" Commerce Clause of the United States Constitution, Article 1, §8, clause 3.

62. Plaintiffs are entitled to: (1) a declaration that the exemptions and/or exclusions identified above, either individually or together, violate the "dormant" or "negative" Commerce Clause of the United States Constitution; (2) an

order invalidating as a matter of law the exemptions and/or exclusions identified above; and (3) an order enjoining the Defendant, his agents, assigns, and successors, from recognizing and/or enforcing those exemptions and/or exclusions.

Claim II: Equal Protection Clause of the United States Constitution

63. Plaintiffs incorporate by reference the above paragraphs as if fully set forth herein.

64. The exemption and/or exclusion from imposition of the sales tax on sales of natural gas by LDCs (R.C. 5739.02(B)(7), .021(E), .023(G), & .026(F); R.C. 5741.02(C), .021(A), .022(A), & .023(A)), the exemption and/or exclusion from the CAT for LDCs (R.C. 5751.01(E)(2)), and the exemption and/or exclusion from the gross receipts tax for inter-LDC sales of natural gas (R.C. 5727.33(B)(5)), either individually or together, treat similarly situated individuals differently, and in particular treat Retail Suppliers more harshly than Choice LDCs even though they are direct competitors in the same competitive retail natural gas service market.

65. The exemption and/or exclusion from imposition of the sales tax on sales of natural gas by LDCs (R.C. 5739.02(B)(7), .021(E), .023(G), & .026(F); R.C. 5741.02(C), .021(A), .022(A), & .023(A)), the exemption and/or exclusion from the CAT for LDCs (R.C. 5751.01(E)(2)), and the exemption and/or exclusion from the gross receipts tax for inter-LDC sales of natural gas (R.C. 5727.33(B)(5)), either individually or together, treat similarly situated individuals differently, and in particular treat customers of Retail Suppliers more harshly than

customers of Choice LDCs even though they are similarly situated.

66. The exemptions and/or exclusions identified above violate the Equal Protection Clause of the United States Constitution, Fourteenth Amendment.

67. Plaintiffs are entitled to: (1) a declaration that the exemptions and/or exclusions identified above, either individually or together, violate the Equal Protection Clause of the United States Constitution, Fourteenth Amendment; (2) an order invalidating as a matter of law the exemptions and/or exclusions identified above; and (3) an order enjoining the Defendant, his agents, assigns, and successors, from recognizing and/or enforcing those exemptions and/or exclusions.

WHEREFORE, Plaintiffs ask the Court for the following relief and judgment:

1. A declaration that the exemptions/exclusions identified above, either individually or together, violate the Commerce Clause of the United States Constitution and/or violate the Equal Protection Clause of the United States Constitution;

2. An order invalidating as matter of law the exemptions/exclusions identified above;

3. A permanent injunction enjoining the Defendant, his agents, assigns, and successors, from recognizing and/or

enforcing those exemptions/exclusions; and

4. Such other relief to which Plaintiffs are entitled.

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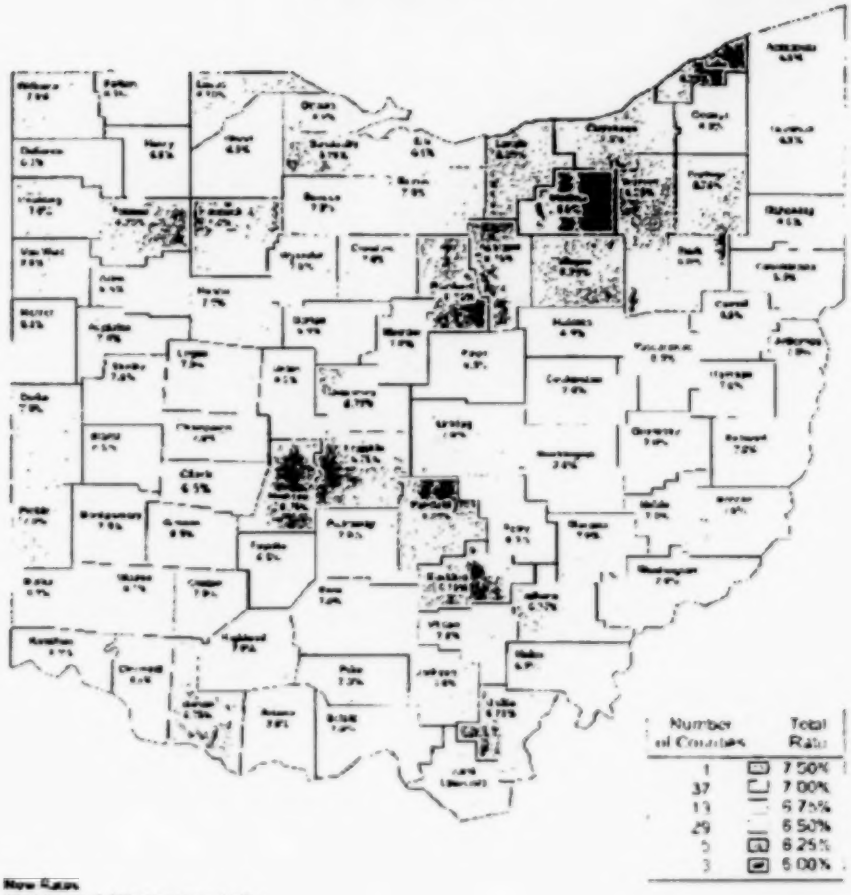
EXHIBIT A
TO COMPLAINT

EXHIBIT
A

Total State and Local Sales Tax Rates, By County
Effective October 2006



New Rates

Ohio Department of Taxation
September 7, 2006

BEST AVAILABLE COPY

Ohio Department of TAXATION

Business Taxpayer Services Section
[illegible]

STATE AND PERMISSIVE SALES TAX RATES BY COUNTY, OCTOBER 2006

County	County Tax Rate	Transit Tax Rate	Total State & Local Rate	County	County Tax Rate	Transit Tax Rate	Total State & Local Rate
Adams	1.50%		7.00%	Licking	1.50%	--	7.00%
Allen	1.00	--	6.50	Logan	1.50	--	7.00
Ashland	1.25	--	6.75	Lorain	0.75	--	6.25
Ashtabula	1.00	--	6.50	Lucas	1.25	--	6.75
Athens	1.25	--	6.75	Madison	1.25	--	6.75
Auglaize	1.50	--	7.00	Mahoning	1.00	--	6.50
Belmont	1.50	--	7.00	Marion	1.00	--	6.50
Brown	1.25	--	6.75	Medina	0.50	--	6.00
Butler	1.00	--	6.50	Meigs	1.00	--	6.50
Carroll	1.00	--	6.50	Mercer	1.00	--	6.50
Champaign	1.50	--	7.00	Miami	1.00	--	6.50
Clark	1.00	--	6.50	Monroe	1.50	--	7.00
Clermont	1.00	--	6.50	Montgomery	1.00	0.50%	7.00
Clinton	1.50	--	7.00	Morgan	1.50	--	7.00
Columbiana	1.00	--	6.50	Morrow	1.50	--	7.00
Coshocton	1.50	--	7.00	Muskingum	1.50	--	7.00
Crawford	1.50	--	7.00	Noble	1.50	--	7.00
Cuyahoga	1.00	1.00%	7.50	Ottawa	1.00	--	6.50
Darke	1.50	--	7.00	Paulding	1.50	--	7.00
Defiance	1.00	--	6.50	Perry	1.00	--	6.50
Delaware	1.25	--	6.75	Pickaway	1.50	--	7.00
Erie	1.00	--	6.50	Pike	1.50	--	7.00
Fairfield	0.75	--	6.25	Portage	1.00	0.25	6.75
Fayette	1.00	--	6.50	Preble	1.50	--	7.00
Franklin	1.00	0.25	6.75	Putnam	1.25	--	6.75
Fulton	1.00	--	6.50	Richland	1.25	--	6.75
Gallia	1.25	--	6.75	Ross	1.50	--	7.00
Geauga	1.00	--	6.50	Sandusky	1.25	--	6.75
Greene	1.00	--	6.50	Scioto	1.50	--	7.00
Guernsey	1.50	--	7.00	Seneca	1.50	--	7.00
Hamilton	1.00	--	6.50	Shelby	1.50	--	7.00
Hancock	0.50	--	6.00	Stark	0.75	0.25	6.00
Hardin	1.50	--	7.00	Summit	0.50	0.25	6.25
Harrison	1.50	--	7.00	Trumbull	1.00	--	6.50
Henry	1.00	--	6.50	Tuscarawas	1.00	--	6.50
Highland	1.50	--	7.00	Union	1.00	--	6.50
Hocking	1.25	--	6.75	Van Wert	1.50	--	7.00
Holmes	1.00	--	6.50	Vinton	1.50	--	7.00
Huron	1.50	--	7.00	Warren	1.00	--	6.50
Jackson	1.50	--	7.00	Washington	1.50	--	7.00
Jefferson	1.50	--	7.00	Wayne	0.75	--	6.25
Knox	1.00	--	6.50	Williams	1.50	--	7.00
Lake	0.50	0.25	6.25	Wood	1.00	--	6.50
Lawrence	1.50	--	7.00	Wyandot	1.50	--	7.00

NOTE: State rate is now 5.5%.

Sept. Per 1, 2006

EXHIBIT B TO COMPLAINT

PUCO Apples to Apples Natural Gas Rate Comparison Chart

Columbia Gas of Ohio

Updated February 20, 2007 – Next Update, February 27, 2007

The PUCO produces the Apples to Apples charts to provide consumers with a snapshot comparison of current natural gas supplier price options and contract terms. The PUCO updates the charts on a regular basis and verifies each supplier offer to ensure accuracy. The chart below lists only the certified suppliers that are actively enrolling new customers. As with all contracts, consumers should carefully read and understand all terms and conditions before signing any forms or agreeing to enroll with a supplier for natural gas service.

The PUCO provides the tools you need to calculate your estimated cost. The self-calculation worksheet following the chart below walks you through the steps needed to manually calculate your own estimated cost. You can also visit *www.PUCO.ohio.gov* and click on the *Apples to Apples* link to access our interactive calculator and automatically calculate your estimated costs.

Columbia Gas of Ohio's Rate

Columbia Gas of Ohio's current total rate is **$1.22502** per hundred cubic feet (Ccf) effective from January 31 2007 to February 28, 2007. This includes a Gas Cost Recovery (GCR) rate of **$0.96787** per Ccf, a gross receipts tax of **$0.04771** per Ccf, and transportation costs of **$0.20944** per Ccf. Columbia Gas of Ohio's GCR rate varies each month and provides a dollar-for-dollar recovery of costs incurred by the local utility to purchase natural gas. The GCR rate allows the local utility to collect any over or under collections of natural gas costs from previous periods if the actual cost is different than the estimate. *Contact information for Columbia Gas of Ohio: 200 Civic Center Dr. Columbus, OH 43215 (800) 344-4077, www.columbiagasohio.com.*

Supplier Rate Offers

The chart below reflects the current offers provided by suppliers that are actively soliciting customers. ***Published price offers and contract terms are subject to change without prior notice and exclude applicable state and county sales tax.*** Supplier prices are not subject to any after-the-fact adjustments like those made to the local utility's GCR rate. ***Consumers should check with suppliers to verify offers before signing a contract.***

Supplier Name	Current Offer per Ccf	Contract Term	Total Rate per Ccf
Commerce Energy **(877) 238-8371** www.commerceenergy.com	a) Fixed Rate Plan - $1.1065 b) Monthly Variable Rate Plan - $0.9832	a) One-Year or Two-Year b) Monthly	a) $1.27346 b) $1.13310
Direct Energy **(888) 565-9986** www.directenergy.com	a) Fixed Rate Plan - $1.0690 b) Fixed Rate Plan - $1.0890 (Plan B - an offer with an introductory Rate - 10% off for 12	a) One-Year b) One-Year	a) $1.23554 b) $1.25966
Dominion East Ohio Energy **(800) 362-4090** www.dom.com/about/gas/companies/ohio/dominion-east-ohio.jsp	a) Fixed Rate Plan - $1.0970 b) Monthly Variable Rate Plan - $0.9700	a) Through Oct 2007 b) Through Dec 2007	a) $1.26326 b) $1.13096
Energy Cooperative of Ohio via SOAR Energy (877) 439-3736 www.soarenergy.com	Monthly Variable Rate Plan - $0.953	Monthly	$1.13195

EXHIBIT B

Supplier Name	Current Offer per Ccf	Contract Term	Total Rate per Ccf
Interstate Gas Supply **(877) 644-7427** www.igsenergy.com	Fixed Rate Plan - $0.9790	Through July 2007	$1.14906
NiaEnergy **(888) 785-4373** www.niaenergy.com	a) Fixed Rate Plan - $1.1500 b) Fixed Rate Plan - $1.1600 c) Fixed Rate Plan - $1.0600 d) Monthly Variable Rate Plan - $0.9900	a) Three-Year b) One-Year c) Six-Month c) Monthly	a) $1.35696 b) $1.32696 c) $1.25696 d) $1.15696
Vectren Source **(800) 518-6748** www.vectrenenergy.com	a) Fixed Rate Plan - $1.1850 b) Monthly Variable Rate Plan - $0.9090	a) One-Year b) Monthly	a) $1.35105 b) $1.13290
WPS Energy Services, Inc. **(866) 336-6547** http://www.wpsenergy.com/ohio	a) Fixed Rate Plan - $1.0863 b) Monthly Variable Rate Plan - $0.9648 c) Monthly Variable Capped-Rate Plan - $0.9650 *(Rate will not exceed $1.2350 through 6/08)* d) Quarterly Variable Rate Plan - $1.0233 *(Rate for offers made on 6/8/2006, rate is per commodity unit. Effective January 2007)* e) Variable Rate with Fixed Winter - Variable Summer Price Plan - $1.2520 *(Fixed Winter rate effective 11/06 - 4/07 Monthly variable rate thereafter)* f) Variable Rate with Fixed Summer, Fixed Winter Price Plan - $0.899 *(Summer Rate effective 5/07-10/07 Winter Rate to be determined)*	As Plans One Year	a) $1.17598 b) $1.13296 c) $1.13296 d) $1.19196 e) $1.41956 f) $1.06596

Includes Transportation rate Jurisdic

Chart Definitions

Ccf One hundred cubic feet, a unit used to measure natural gas usage

Competitive Retail Natural Gas Service Surrecdit Rider An adjustment used to reimburse customers for charges attributable to natural gas commodity sales service for customers that no longer purchase their natural gas from the local utility. The surcredit rider will remain in effect until the local utility establishes new basic rates and recalculates the surcredit rider for CHOICE customers who no longer purchase natural gas from their local utility.

Contract Term The length or duration of the contract (i.e. monthly, yearly or multi-year)

County Sales Tax When natural gas is purchased from a supplier, the natural gas is subject to Ohio sales or use tax.

Questions to ask Suppliers

- Are there any deposit requirements?
- Do you charge any early termination fees? If so, how much?
- Do you charge any switching, membership or other fees?
- Are you certified by the PUCO?
- Is your rate fixed, or does it change?
- If it is a variable rate, how does it change?
- Is there a customer incentive for signing up?
- Are there any built-in price increases or decreases?
- Are there any special add-on services?
- How long is the contract for this offer?
- Does your service cover all months of the year?
- What happens when my contract expires?
- Will I receive one or two bills a month?

Because county sales tax rates vary throughout Ohio, the county sales tax is not included in this supplier's total rate. Use the attached map to determine your county's sales tax rate.

The Public Utilities Commission of Ohio

Current Offer Comprised of suppliers' current commodity options and base rates, exclusive of sales tax, the local utility transportation charge, and customer service charges. Commodity options may be a fixed, variable, or stable rate plan.

Expected Gas Cost (EGC) A component of the GCR, the EGC is the price the local utility expects to pay for natural gas in the upcoming GCR rate period. For example, if the GCR rate is filed on a monthly basis, the local utility will calculate the EGC for the following month. Gas costs recoverable through the EGC include the cost of purchasing the gas itself as well as the cost of transporting the gas from the producing region to the local utility's service territory through the interstate pipeline system.

Fixed Rate Plan A constant rate for the contracted period.

Gas Cost Recovery (GCR) Rate A mechanism that provides a dollar-for-dollar recovery of costs incurred by a natural gas utility to purchase natural gas for its system. The GCR mechanism enables the local utility to collect any over or under collections of natural gas costs from previous periods.

GCR Transition (GCRT) Rider A component of the transportation rate charge, the GCRT rider is an adjustment used to reimburse or charge customers for any over or under recovery of previous year's gas cost charges. Although all customers are assessed a transportation rate charge, following 12 months participation in a CHOICE customer the GCR transition rider is eliminated from the customer's bill. Because the GCR transition rider only impacts the transportation charges of CHOICE customers of less than 12 months participation, the total rate is calculated with these customers in mind.

Gross Receipts Tax When natural gas is purchased from a local utility, it is not subject to Ohio sales or use tax. The local utility must pay a gross receipts excise tax which is included in the GCR rate charged for the natural gas based on the volume of gas consumed (per Ccf).

Stable Rate Plan A variable rate for a fixed period of time.

Supplier Name PUCO-certified suppliers that are actively enrolling new customers.

Total Rate Comprised of the supplier's natural gas commodity price, plus the transportation rate charge.

Transportation Rate Charge The transportation rate charge, which can fluctuate quarterly, is comprised of a base rate, Percentage of Income Payment Plan rider, temporary base rate reconciliation rider, excise tax rider, uncollectible expense rider, competitive retail natural gas service surcredit rider, and GCR transition rider.

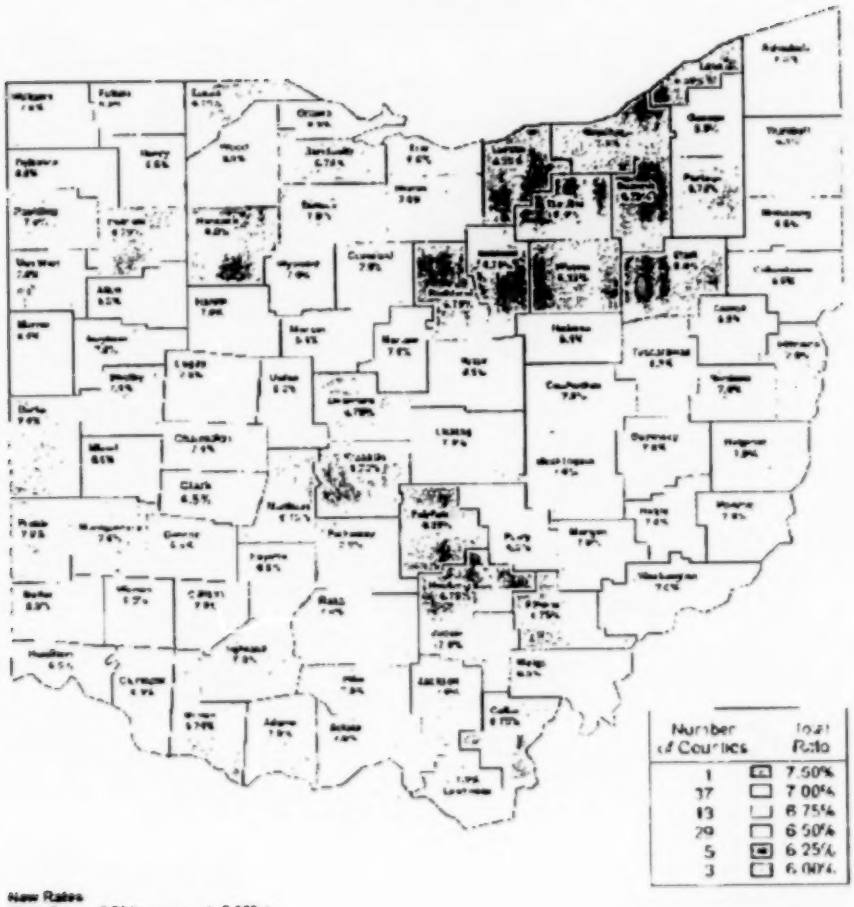
Variable Rate Plan A fluctuating rate within the contracted period.

Self-Calculation Worksheet

This self-calculation worksheet will provide you with an estimate of your monthly natural gas costs, based on your average monthly gas usage, current supplier price, transportation and service charges, and local sales tax. You may also wish to visit www.PUCO.ohio.gov to access our interactive *Apples to Apples* calculator.

	Example	Your Calculation
Step 1. Supplier Offer Insert the supplier's current offer	**Supplier Offer: $1.00/Ccf**	**Supplier Offer: $_____/Ccf**
Step 2: Figure your Average Monthly Usage Divide your annual gas usage in Ccf (provided on your monthly bill) by 12.	(annual gas usage) 805 Ccf ÷ 12 **Average Monthly Usage:** 67.1 Ccf	(annual gas usage) _____ ÷ 12 **Average Monthly Usage:** _____ Ccf
Step 3. Supplier Charge Multiply the supplier offer by your monthly gas usage.	(supplier offer) $1.00 (average monthly usage) x 67.1 **Supplier Charge** $67.10	(supplier offer) $ _____ (average monthly usage) x _____ **Supplier Charge** $
Step 4. Tax on Supplier Charge Multiply the supplier charge by your county sales tax rate to obtain this rate, use the chart on the next page)	(supplier charge) $67.10 (county sales tax rate) x 0.07 **Tax on Supplier Charge** $4.70	(supplier charge) $ _____ (county sales tax rate) x 0 ___ Tax on Supplier Charge. $ _____
Step 5. Delivery Rate (gas usage and gas cost charges and credits) Insert your delivery service rate.	**Select $0.16696/Ccf if you have been a choice customer for less than 12 mos.** **or** **Select $0.20885 /Ccf if you have been a choice customer for more than 12 mos.**	$ _____ /Ccf
Step 6: Delivery Charge Multiply the delivery rate by your average monthly usage.	(delivery rate) $0.16696 (average monthly usage) x 67.1 **Delivery Charge.** $11.20	(delivery rate) $ _____ (average monthly usage) x _____ **Delivery Charge:** $ _____
Step 7. Supplier Estimated Monthly Cost Add the supplier charge, the tax on supplier charge, the delivery charge, and a monthly customer charge of $6.50.	(supplier charge) $67.10 (sales tax on supplier charge) 4.70 (delivery charge) 11.20 (monthly customer charge) + 6.50 **Estimated Monthly Cost:** $89.50	(supplier charge) $ _____ (tax on supplier charge) _____ (delivery charge) _____ (monthly customer charge) + 6.50 **Estimated Monthly Cost** $
Step 8: Columbia Gas of Ohio Estimated Monthly Cost Multiply Columbia Gas of Ohio's current tariff rate by your average monthly usage, then add the monthly customer charge.	(current total rate) $1.22502 (average monthly usage) x 67.1 (subtotal) $82.20 (monthly customer charge) + 6.50 **Estimated Monthly Cost** $88.70	(current total rate) $1.22502 (average monthly usage) x _____ (subtotal) $ _____ (monthly customer charge) + 6.50 **Estimated Monthly Cost** $
Step 9: Compare Compare the supplier's estimated monthly cost to that of Columbia Gas of Ohio.	**Supplier: $89.50/month** **Columbia Gas of Ohio: $88.70/month**	**Supplier** $ _____ /month **Columbia Gas of Ohio** $ _____ /month

Total State and Local Sales Tax Rates, By County
Effective October 2006



New Rates
Clark County 6.50% , previously 7.00%)

Ohio Department of Taxation
September 7, 2006

Ohio Department of TAXATION

Business Taxpayer Services Division
[illegible]

STATE AND PERMISSIVE SALES TAX RATES BY COUNTY, OCTOBER 2008

County	County Tax Rate	Transit Tax Rate	Total State & Local Rate	County	County Tax Rate	Transit Tax Rate	Total State & Local Rate
Adams	1.50%	--	7.00%	Licking	1.50%	--	7.00%
Allen	1.00	--	6.50	Logan	1.50	--	7.00
Ashland	1.25	--	6.75	Lorain	0.75	--	6.25
Ashtabula	1.00	--	6.50	Lucas	1.25	--	6.75
Athens	1.25	--	6.75	Madison	1.25	--	6.75
Auglaize	1.50	--	7.00	Mahoning	1.00	--	6.50
Belmont	1.50	--	7.00	Marion	1.00	--	6.50
Brown	1.25	--	6.75	Medina	0.50	--	6.00
Butler	1.00	--	6.50	Meigs	1.00	--	6.50
Carroll	1.00	--	6.50	Mercer	1.00	--	6.50
Champaign	1.50	--	7.00	Miami	1.00	--	6.50
Clark	1.00	--	6.50	Monroe	1.50	--	7.00
Clermont	1.00	--	6.50	Montgomery	1.00	0.50%	7.00
Clinton	1.50	--	7.00	Morgan	1.50	--	7.00
Columbiana	1.00	--	6.50	Morrow	1.50	--	7.00
Coshocton	1.50	--	7.00	Muskingum	1.50	--	7.00
Crawford	1.50	--	7.00	Noble	1.50	--	7.00
Cuyahoga	1.00	1.00%	7.50	Ottawa	1.00	--	6.50
Darke	1.50	--	7.00	Paulding	1.50	--	7.00
Defiance	1.00	--	6.50	Perry	1.00	--	6.50
Delaware	1.25	--	6.75	Pickaway	1.50	--	7.00
Erie	1.00	--	6.50	Pike	1.50	--	7.00
Fairfield	0.75	--	6.25	Portage	1.00	0.25	6.75
Fayette	1.00	--	6.50	Preble	1.50	--	7.00
Franklin	1.00	0.25	6.75	Putnam	1.25	--	6.75
Fulton	1.00	--	6.50	Richland	1.25	--	6.75
Gallia	1.25	--	6.75	Ross	1.50	--	7.00
Geauga	1.00	--	6.50	Sandusky	1.25	--	6.75
Greene	1.00	--	6.50	Scioto	1.50	--	7.00
Guernsey	1.50	--	7.00	Seneca	1.50	--	7.00
Hamilton	1.00	--	6.50	Shelby	1.50	--	7.00
Hancock	1.50	--	7.00	Stark	0.25	0.25	6.00
Hardin	1.50	--	7.00	Summit	0.50	0.25	6.25
Harrison	1.50	--	7.00	Trumbull	1.00	--	6.50
Henry	1.00	--	6.50	Tuscarawas	1.00	--	6.50
Highland	1.50	--	7.00	Union	1.00	--	6.50
Hocking	1.25	--	6.75	Van Wert	1.50	--	7.00
Holmes	1.00	--	6.50	Vinton	1.50	--	7.00
Huron	1.50	--	7.00	Warren	1.00	--	6.50
Jackson	1.50	--	7.00	Washington	1.50	--	7.00
Jefferson	1.50	--	7.00	Wayne	0.75	--	6.25
Knox	1.00	--	6.50	Williams	1.50	--	7.00
Lake	0.50	0.25	6.25	Wood	1.00	--	6.50
Lawrence	1.50	--	7.00	Wyandot	1.50	--	7.00

NOTE: State rate is now 5.5%.

September 7, 2008

PETITIONER'S BRIEF

149

(7)

Supreme Court, U.S.
FILED
DEC 23 2009
OFFICE OF THE CLERK

No. 09-223

In the Supreme Court of the United States

RICHARD A. LEVIN, Tax Commissioner of Ohio,
Petitioner,

v.

COMMERCE ENERGY, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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5AV9JS

QUESTIONS PRESENTED

1. Did the Court's decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), which addressed the scope of the Tax Injunction Act's bar against federal cases seeking to enjoin the assessment and collection of state taxes, eliminate or narrow the doctrine of comity, which more broadly precludes federal jurisdiction over cases that intrude on the administration of state taxation?

2. Do either comity principles or the Tax Injunction Act bar federal jurisdiction over a case in which taxpayers allege, on equal protection and dormant Commerce Clause grounds, that their tax assessments are discriminatory relative to other taxpayers' assessments?

LIST OF PARTIES

The Petitioner is Richard Levin, the Tax Commissioner of the State of Ohio.

Respondents are Commerce Energy, Inc. (d.b.a. Commerce Energy of Ohio), Interstate Gas Supply, Inc., and Gregory Slone.

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OPINIONS BELOW

The Sixth Circuit's opinion, *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094 (6th Cir. 2009), and orders are reproduced at Pet. App. 1a-2a, 3a-18a. The United States District Court for the Southern District of Ohio's opinion and order is reproduced at Pet. App. 19a-33a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its original judgment and opinion on February 4, 2009. The Sixth Circuit denied rehearing en banc on May 22, 2009. The State of Ohio timely filed a petition for a writ of certiorari and invoked the Court's jurisdiction under 28 U.S.C. § 1254(1). This Court granted the petition on November 2, 2009. 130 S. Ct. 496 (2009).

STATUTORY PROVISIONS INVOLVED

The Tax Injunction Act, Section 1341 of Title 28 of the United States Code, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

INTRODUCTION

When a plaintiff challenges a state tax law in federal court, the suit may be barred in one of two ways: by principles of comity or by the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341. Comity principles preceded the TIA and, as the Court has repeatedly explained, retain a broader scope even after the statute's enactment. See, e.g., *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 110-11 (1981). The comity doctrine affords due respect for the States' sovereign authority over their own tax policies and preserves fiscal stability by preventing unwarranted federal court intrusion in questions of state tax law.

The central question in this case is whether comity principles remain independently vital after the Court's decision interpreting the TIA in *Hibbs v. Winn*, 542 U.S. 88 (2004). Since *Hibbs* did not purport to overrule *Fair Assessment*, the answer should be easy. Yet the Sixth Circuit held here that *Hibbs* effectively rendered the comity doctrine a dead letter in tax cases.

This case perfectly illustrates why that view is wrong. If the comity doctrine is to have any force independent of the TIA (as this Court has said again and again it must), it surely precludes Respondents' claim that Ohio law taxes them unevenly vis-à-vis their competitors. Resolving that claim would require the federal court to undertake a detailed analysis of state tax and regulatory policy, and any relief to which Respondents might be entitled would substantially alter Ohio's tax regime.

Even if the comity doctrine does not survive *Hibbs*, however, this case bears all the hallmarks of cases to which the TIA applies. *Hibbs* allowed a challenge to a state tax to proceed in federal court under the TIA only in the narrow circumstances where it was (1) brought by a third party, (2) would not reduce state revenues, and (3) rested on the Establishment Clause. *Hibbs* in no way countenanced intrusive federal suits—like this one—brought by business plaintiffs claiming that their own taxes are unfair relative to their competitors'. Whether by dint of comity principles or the TIA, this case belongs in state court.

STATEMENT OF THE CASE

A. Respondents sued the State in federal court for allegedly discriminatory tax treatment.

Respondents are Commerce Energy, Inc. (d.b.a. Commerce Energy of Ohio), Interstate Gas Supply, Inc. ("IGS"), and Gregory Slone. Commerce Energy is a "retail natural gas supplier" or "independent marketer," as those terms are explained below, that sells natural gas in Ohio. J.A. 2 (Compl. ¶ 1). IGS is also such a seller, J.A. 2 (Compl. ¶ 2), and Slone is a residential customer of IGS, J.A. 2-3 (Compl. ¶ 3).

The natural gas market in Ohio has been partly deregulated, such that most residential and business consumers may now purchase natural gas in one of two ways. First, the consumer may buy gas from the state-regulated public utility serving the customer's area. These companies, which once were

monopoly sellers in their respective areas, are called "natural gas companies" in Ohio law. Ohio Rev. Code § 4905.03(A)(6). They are also called "local distribution companies," or LDCs. *General Motors Corp. v. Tracy*, 519 U.S. 278, 282 (1997). LDCs sell customers a bundled product consisting of both (1) the gas itself, as a commodity, and (2) delivery of the gas by pipeline into the customer's home or business. J.A. 4 (Compl. ¶ 9).

Second, a consumer may, under Ohio's "Consumer Choice" program, Ohio Rev. Code § 4929.02, purchase natural gas from any of the newer companies, such as Respondents, that now compete with the LDCs for retail sales of the unbundled "gas as a commodity" product. These companies are called "independent marketers" ("IMs"), or, as Respondents call themselves, "Retail Suppliers." J.A. 2 (Compl. ¶ 1). When a consumer selects an IM, he actually buys two unbundled products: delivery (from the LDC, which carries the product through its exclusive pipeline into the home) and the gas itself (from the IM). J.A. 7 (Compl. ¶ 20). A residential consumer receives a single bill from the LDC, but the bill separately enumerates the delivery and gas charges. J.A. 8-9 (Compl. ¶ 24). The LDC collects the full amount and remits the IM's share to the IM. *Id.*

The IMs and LDCs are subject to different regulatory and taxation regimes. The LDCs, for example, are obliged to serve everyone in their respective territories, see Ohio Rev. Code §§ 4905.03(A)(6), 4905.06, 4905.35; *Tracy*, 519 U.S. at 297—a duty that the IMs do not bear. Also, the Public Utilities Commission of Ohio ("PUCO")

regulates the LDCs' rates and sets tariffs on a "cost-plus" basis, which allows the LDCs the opportunity to recover their costs under a set formula and earn a PUCO-approved rate of return. Ohio Rev. Code §§ 4905.22, 4905.302; Ohio Admin. Code Ch. 4901:1-14; e.g., *Vectren Energy Delivery of Ohio, Inc. v. PUCO*, 863 N.E.2d 599 (Ohio 2007) (applying the "gas cost recovery process" established under Ohio Admin. Code Ch. 4901:1-14); see also *Tracy*, 519 U.S. at 297. The IMs are not subject to a similar rate-setting regime.

Along with divergent regulatory duties, the two types of gas sellers also face differing state tax structures, and Respondents object to these tax differences. First, customers, such as Respondent Slone, pay an ordinary sales tax on their purchases of gas from IMs. J.A. 13 (Compl. ¶¶ 40-42). (Respondents also object to Ohio's use tax; they define "sales tax" to include both. *Id.*) Ohio's statewide sales tax is 5.5%. Ohio Rev. Code §§ 5739.02–.025 (sales), 5741.02 (use). Ohio's counties may add a "piggyback" sales tax of up to 3%. Ohio Rev. Code §§ 5739.021 et seq., 5741.021 et seq. Currently, the combined sales tax rate in Ohio's counties ranges from 6.0% to 7.5%. J.A. 13, 22-23 (Compl. ¶¶ 41, 45 & Ex. A).

Second, the IMs pay a business tax called the "commercial activities tax," or CAT, which applies to almost all Ohio businesses and taxes a company's gross receipts generated in Ohio. J.A. 15-16 (Compl. ¶ 49); Ohio Rev. Code § 5751.02. A company pays no tax on its first $150,000 in such gross receipts, Ohio Rev. Code § 5751.01(E)(1); it then pays a flat tax of $150 for receipts between $150,000 and $1 million.

Ohio Rev. Code § 5751.03. Gross receipts over $1 million are taxed at 0.26%. *Id.*

LDCs pay taxes through a different mechanism. They do not pay the CAT, and their customers are exempt from paying the sales tax. Ohio Rev. Code §§ 5751.01(E)(2); 5739.02(B)(7), .021(E), .023(G), & .026(F); 5741.02(C); .021(A); .022(A); & .023(A). Instead, the LDCs pay a "gross receipts excise tax," or GRT, aimed solely at them. The GRT taxes gross receipts at a statutory rate of 4.75%, Ohio Rev. Code § 5727.24, although the effective rate is closer to 5%, see J.A. 14 (Compl. ¶ 43). The GRT is also assessed against a broad array of an LDC's receipts beyond consumer sales of gas. Ohio Rev. Code § 5727.33. Ohio's public utilities regulations allow each LDC to include its GRT payments in its costs when calculating the cost-plus rate that the LDC may charge consumers. See Ohio Admin. Code § 4901:1-14-05 (specifying formula for "gas cost recovery rate" and authorizing "other factors" to be specified in appendix to cited rule); see Appendix at http://www.registerofohio.state.oh.us/pdfs/4901/1/14/4901$1-14-05_FF_A_APP1_20040805_1202.pdf (last visited Dec. 18, 2009).

LDCs also pay two other taxes that the IMs do not. The first, called the "MCF tax," is based on the volume of gas that the LDCs sell and deliver. ("MCF" stands for "thousands of cubic feet," the basis for measuring natural gas volume.) Ohio Rev. Code § 5727.811. The second is a personal property tax that once was charged to almost all Ohio companies. That tax has now been phased out for IMs and most other companies but retained for public utilities such as LDCs. Ohio Rev. Code § 5727.06.

Respondents argue that this different tax treatment violates equal protection and dormant Commerce Clause principles. They allege that the GRT is like the sales tax, in that the cost-plus regulations allow the LDCs to pass the cost on to customers. J.A. 14-15 (Compl. ¶¶ 45, 48). Because the GRT rate is 4.75%, and the sales tax rates vary from 6% to 7.5%, Respondents allege that "[t]he exemption from the sales tax for sales made by a Choice LDC (at least an exemption over and above what is paid pursuant to the gross receipts tax) discriminates against interstate commerce by providing an exemption that benefits" only LDCs. J.A. 15 (Compl. ¶ 48). They also allege that "[t]he exclusion of LDCs from the CAT imposes an additional tax on the sales of natural gas by [IMs] that is not imposed on the sales of natural gas by LDCs." J.A. 16 (Compl. ¶ 53). Finally, Respondents complain that Ohio law, in calculating the GRT, excludes receipts generated by sales of natural gas between LDCs. J.A. 18 (Compl. ¶ 58).

Invoking the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, J.A. 3 (Compl. ¶ 6), Respondents requested the following relief:

1. "[a] declaration that the exemptions/exclusions identified above, either individually or together, violate the Commerce Clause . . . and/or violate the Equal Protection Clause";
2. "[a]n order invalidating" the exemptions/exclusions;
3. "[a] permanent injunction enjoining" Petitioner Levin and his agents from

"recognizing and/or enforcing those exemptions/exclusions"; and

4. "[s]uch other relief to which Plaintiffs are entitled."

J.A. 20-21 (Compl., prayer for relief).

B. The district court dismissed on comity grounds, but the appeals court reversed and allowed the case to proceed.

The State moved to dismiss, arguing that both the TIA and comity principles preclude federal jurisdiction. Pet. App. 21a-22a, 26a. The district court granted the motion to dismiss. With respect to the TIA, the district court held that Respondents fell under the *Hibbs* allowance for third-party challenges because they do not challenge their own tax liability. *Id.* at 24a. The court reasoned that invalidating the LDCs' exemptions would increase, not decrease, the State's revenue. *Id.* The court therefore concluded that the TIA did not bar the suit. *Id.* at 26a.

The district court then held, however, that comity principles did bar the suit. *Id.* at 29a, 31a. The court reasoned that *Hibbs* did not alter the scope of the comity bar, because "[n]owhere did the *Hibbs* Court address principles of comity beyond the scope of determining the TIA's application to the case before it." *Id.* at 28a. The court noted that "general principles of comity extend beyond the comity rationale underlying the TIA," *id.* at 28a, and it concluded that such principles required dismissal, *id.* at 29a, 31a.

The Sixth Circuit reversed, holding that neither the TIA nor comity principles precluded

Respondents' federal action. The appeals court first adopted the district court's reasoning as to the TIA. *Id.* at 7a, 9a. The court then reversed the district court's comity holding, finding that *Hibbs* had narrowed *Fair Assessment*'s broad description of comity, and that, following *Hibbs*, comity—like the TIA—can be invoked "only when plaintiffs try to thwart tax collection." *Id.* at 11a. The court acknowledged that "there is a circuit split" on the issue, *id.* at 10a, but it adopted a restrictive reading of comity principles in *Hibbs*'s wake.

After the Sixth Circuit denied the State's request for rehearing en banc, Pet. App. 1a, the Tax Commissioner sought this Court's review, highlighting the circuit split that the appeals court had identified. Compare *DirecTV, Inc. v. Tolson*, 513 F.3d 119, 127-28 (4th Cir. 2008) (holding that *Hibbs* had no effect on the comity principle), with *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 17-18 (1st Cir. 2009) (holding that *Hibbs* sharply limited the scope of the comity bar); *Levy v. Pappas*, 510 F.3d 755, 761-62 (7th Cir. 2007) (placing comity in lockstep with the TIA); *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005) (same). This Court granted review. 130 S. Ct. 496 (2009).

SUMMARY OF ARGUMENT

For well over a century, this Court has applied principles of comity to preclude federal courts from entertaining intrusive challenges to state tax laws. See *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108 (1871). The comity rule properly defers to the States' sovereign authority over their own tax policies, preserves fiscal stability by avoiding disruption of local revenue streams, and respects the States' courts and administrative processes.

The Tax Injunction Act buttresses, rather than supplants, these essential principles. Congress enacted the TIA to respond to a specific problem: Notwithstanding the comity doctrine, federal courts were too liberally entertaining challenges to state tax systems on the ground that the available state remedies were inadequate. Congress fixed that narrow problem by instructing district courts to evaluate the available state law remedy under a more deferential standard. This Court has made clear that two things remain true in the TIA's wake: The comity doctrine survived the TIA's enactment, and comity principles apply more broadly than the federal statute. See *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 110-11 (1981).

This Court's recent decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), changed neither of those precepts. *Hibbs* held simply that the suit before it could proceed in federal court—under both the TIA and comity principles—because three characteristics distinguished it from cases that came before: (1) the plaintiffs were third parties to the challenged tax credit who did not object to their own liability; (2) the suit, if successful, would increase, rather than

decrease, state revenue; and (3) the substantive basis of the challenge—the Establishment Clause—did not require a searching review of the state tax law's operation, which was not even in dispute. *Hibbs* did not purport to overrule earlier decisions holding that the freestanding comity doctrine is broader than the TIA. Nor did it need to. It was enough for the Court to hold that, however broadly comity principles reach, they did not apply to the narrow case before it.

If the comity doctrine has any vitality after *Hibbs*, it bars this case. To resolve Respondents' dormant Commerce Clause and equal protection claims, the federal court would have to undertake a granular analysis of Ohio's tax and public-utilities laws. And if Respondents prevail on the merits, any possible relief would intrusively alter Ohio's tax system. Principles of comity and federalism do not permit such disruptive federal court intervention in state tax regimes.

Even if comity principles do not apply, the TIA itself strips the federal courts of jurisdiction over Respondents' suit. This case satisfies none of the exceptions to the TIA articulated in *Hibbs*: (1) Respondents are not third parties, because they object to their own tax liability relative to their competitors'; (2) their challenge jeopardizes state revenue; and (3) their suit is not of the subject matter type that this Court has explained falls outside of the TIA's reach.

The Sixth Circuit was therefore doubly wrong to remand this case to the district court. The Court should reverse that judgment and allow the Ohio courts the opportunity to review their own State's tax system.

ARGUMENT

A. Principles of comity preclude federal district courts from hearing suits that challenge the operation of a state system of taxation.

Comity concerns are not unique to the tax context. In all cases implicating the relationship between the state and federal governments, fundamental principles of federalism and comity require that federal courts afford "a proper respect for state functions" and avoid "undu[e] interfere[nce] with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). These precepts carry all the more weight "in suits challenging the constitutionality of state tax laws . . . because of the delicate balance between the federal authority and state governments, and the concomitant respect that should be accorded state tax laws in federal court." *Fair Assessment*, 454 U.S. at 108. These concerns apply with full force to this case.

1. The broader comity doctrine both preceded and subsists after Congress's enactment of the Tax Injunction Act.

The comity doctrine in tax cases was engendered in part by the inherent limits on equity. The Court long ago recognized that "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). The

Dows Court accordingly instructed that "[n]o court of equity will . . . allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law." *Id.*

Later cases explained that "this guiding principle" of equitable restraint carries "peculiar force in cases where the suit . . . is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty." *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932). In *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909), for instance, the Court surveyed its decisions and found that "a proper reluctance to interfere by prevention with the fiscal operations of the state governments ha[d] caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired." The Court's repeated instructions were clear: So long as the state remedy was "plain, adequate, and complete," the "scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Matthews*, 284 U.S. at 525-26; accord *Singer Sewing Mach. Co. v. Benedict*, 229 U.S. 481, 484-85 (1913).

Congress enacted the Tax Injunction Act in 1937 to reinforce these background equitable principles. Despite the well-settled comity rule, "the federal courts had become 'free and easy with

injunctions'" in state tax cases by opening two specific loopholes in the doctrine. *Fair Assessment*, 454 U.S. at 129 (Brennan, J., concurring in the judgment) (citation omitted). First, federal courts held that, although "equity jurisdiction does not lie where there exists an adequate legal remedy," that phrase meant an "'adequate legal remedy' cognizable *in federal court*." *Id.* at 129 n.15 (citing *City Bank Co. v. Schnader*, 291 U.S. 24, 29 (1934)). And sovereign immunity, among other jurisdictional limitations, meant that a remedy cognizable in federal court often did not exist in tax cases. *Id.* Second—and more often—"the federal courts, in construing strictly the requirement that the remedy available at law be 'plain, adequate and complete,' had frequently concluded that the procedures provided by the State were not adequate." *Id.*; see, e.g., *Gully v. Interstate Natural Gas Co.*, 82 F.2d 145 (5th Cir. 1936); *City of Fort Worth v. Southwestern Bell Tel. Co.*, 80 F.2d 972 (5th Cir. 1936); see also Note, *Federal Court Interference with the Assessment and Collection of State Taxes*, 59 Harv. L. Rev. 780, 782-83 & nn.13-14 (1946) (citing cases). Congress closed both loopholes by barring district courts from enjoining state tax laws when *state* law (not federal law) provided a remedy, and by setting forth a more deferential standard by which to evaluate the adequacy of that remedy. See *Fair Assessment*, 454 U.S. at 109-110; *id.* at 129 n.15 (Brennan, J., concurring in the judgment).

This Court quickly explained that the TIA bolstered but did not displace the comity doctrine, and that the comity rule's scope was broader than the TIA's. First, in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the Court

considered a federal action for declaratory relief against a state tax law. The Court looked to the recently enacted TIA and found it unclear whether the statute's terms covered actions for declaratory relief. *Id.* at 299. But the Court saw no need to resolve the question under the new statute, because the preexisting comity doctrine resolved the matter. *Id.* The TIA's enactment, the Court observed, "is hardly an indication of disapproval of the policy of federal equity courts, or a mandatory withdrawal from them of their traditional power to decline jurisdiction in the exercise of their discretion." *Id.* at 301. The Court accordingly held that the comity principles "which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." *Id.* at 299.

The Court has repeatedly confirmed *Great Lakes*' holding that the comity doctrine extends beyond the bounds of the TIA. Most prominently, in *Fair Assessment*, the plaintiffs sought damages under 42 U.S.C. § 1983 (rather than injunctive or declaratory relief) "to redress the allegedly unconstitutional administration of a state tax system." 454 U.S. at 101. The Court reviewed both pre-TIA law and the TIA's legislative history to conclude that comity has a broader scope than the TIA alone, and that "the principle of comity which predated the Act was not restricted by its passage." *Id.* at 110. The Court further explained that *Great Lakes* "demonstrates not only the post-Act vitality of the comity principle, but also its applicability to actions seeking a remedy other than injunctive relief." *Id.* at 111. In *Great Lakes*, "[t]he focus was not on the specific form of relief requested," but on

the "practical effects" engendered by even a declaration. *Id.* The damages relief sought in *Fair Assessment,* said the Court, "would have a similarly disruptive effect." *Id.*; see also *Samuels v. Mackell*, 401 U.S. 66, 71-72 (1971).

Case after case has reiterated this rule. In *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 525 n.33 (1981), for instance, the Court explained that "even where the Tax Injunction Act would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief." And in *National Private Truck Council v. Oklahoma Tax Commission*, 515 U.S. 582, 584-85 (1995) ("*NPTC*"), the plaintiffs brought a § 1983 action in state court, but the Oklahoma Supreme Court declined to afford relief because adequate remedies existed under state law. In affirming the state court's judgment, this Court explained that, "[g]iven the strong background presumption against interference with state taxation, the Tax Injunction Act may be best understood as but a partial codification of the federal reluctance to interfere with state taxation." *Id.* at 590 (citing *Fair Assessment*, 454 U.S. at 110). The Court therefore held that "state courts, like their federal counterparts, must refrain from granting federal relief under § 1983 when there is an adequate legal remedy." *Id.* at 592. This principle applied, the Court explained, regardless of whether the requested relief was injunctive or declaratory in nature. *Id.* at 591.

Beyond core federalism safeguards for state sovereignty, three specific rationales animate this "hands-off approach" to state tax challenges. *NPTC*,

515 U.S. at 586. First and foremost, it preserves the States' fiscal stability. "Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions . . . restraining collection of state taxes." *Great Lakes*, 319 U.S. at 298. If federal court-ordered "'relief were available to test state tax assessments, state tax administration might be thrown into disarray.'" *Fair Assessment*, 454 U.S. at 108 n.6 (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)). That threat is especially acute given "the dependency of state budgets on the receipt of local tax revenues," *Rosewell*, 450 U.S. at 527, and the reality that "[t]he power to tax is basic to the power of the State to exist." *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 826 (1997).

Second, state tax policy warrants particular deference as a matter of sovereign authority. See *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 116-17 (1874); *Missouri v. Jenkins*, 495 U.S. 33, 69 (1990) (Kennedy, J., concurring in part and concurring in the judgment). The power to tax is "an essential attribute of sovereignty," *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 498 (2003)—"'the life-blood of government,'" *Franchise Tax Bd. v. United States Postal Serv.*, 467 U.S. 512, 523 (1984) (citation omitted). "In structuring internal taxation schemes the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (internal quotations and citations omitted). "Indeed, 'in taxation, even more than in other fields, legislatures

possess the greatest freedom in classification.'" *Tracy*, 519 U.S. at 311 (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). This approach recognizes not only state sovereignty, but also the judiciary's practical limitations. In *Tracy*, for instance, the Court acknowledged that it "lack[ed] the expertness and the institutional resources necessary to predict the effects of judicial intervention invalidating Ohio's tax scheme on the utilities' capacity to serve [a] captive market." *Id.* at 304.

In this regard, the comity rule resembles abstention doctrines that respect "the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (internal quotations and citation omitted); see, e.g., *Lac D'Amiante Du Quebec, LTEE v. Am. Home Assurance Co.*, 864 F.2d 1033, 1046 (3d Cir. 1988) (applying *Burford* abstention because federal intervention would have been "highly disruptive to the state's regulatory scheme" for the liquidation of insolvent insurers). In fact, this Court has cited *Great Lakes*—which was decided the same day as *Burford*—as a case in which abstention was appropriate because of due "regard for federal-state relations." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 816-17 (1976); see also *Samuels*, 401 U.S. at 71; 17A James Wm. Moore et al., *Moore's Federal Practice* § 121.46 (3d ed. 2009) (citing *Fair Assessment* and *Great Lakes* as cases barred by abstention rather than the TIA).

Third, the comity doctrine respects the vital role played by the States' own courts and administrative processes. See *Fair Assessment*, 454 U.S. at 108 n.6 (citing *Perez*, 401 U.S. at 128 n.17

(Brennan, J., concurring in part and dissenting in part)). "The federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the federal judiciary," particularly "respecting questions of state taxation." *Farm Credit Servs.*, 520 U.S. at 826. "State courts are the principal expositors of state law," and they have the opportunity in "[a]lmost every constitutional challenge" to impart a "narrowing construction[] that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests." *Moore v. Sims*, 442 U.S. 415, 429-30 (1979). "When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals." *Id.* at 430. These comity interests apply equally to administrative processes. See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

The case law therefore settles three propositions: (1) Even after the TIA's enactment, the robust comity doctrine continues to bar intrusive review of state tax law; (2) the comity doctrine reaches more broadly than the TIA; and (3) the doctrine applies regardless of whether the requested relief is declaratory, injunctive, or compensatory in nature. Nothing in *Hibbs* affected those three propositions.

2. *Hibbs v. Winn* only confirms the vitality of the comity doctrine.

This Court's repeated observation that "[t]he principle of comity which predated the [TIA] was not

restricted by its passage," *Fair Assessment*, 454 U.S. at 110, should suffice to resolve this case. If it does not, it is because *Hibbs v. Winn* overruled, *sub silentio*, an unbroken line of comity cases extending back at least as far as *Dows* in 1871. But this reading of *Hibbs* is not a plausible understanding either of the Court's opinion or of the TIA itself.

a. *Hibbs* left comity principles intact.

Hibbs involved an Establishment Clause challenge to an Arizona tax credit for payments to organizations that award scholarships to children attending private schools. 542 U.S. at 92-93. The tax credit at issue was not so much a revenue-raising device as it was a subsidy to advance a particular educational policy. See *id.* at 92-93. The plaintiffs sought injunctive and declaratory relief, and the central question was whether their challenge sought to enjoin the "assessment" of a state tax within the meaning of the TIA. See *id.* at 99-100. The Court looked to the statute's history, purpose, and case law and determined that Congress's word choice reflected its primary concern—revenue collection. *Id.* at 100-107.

Three factors were critical to the Court's holding that the suit could proceed in federal court because it did not threaten state revenue. First, the measure at issue was a tax *credit*, and the Court noted that a judgment invalidating a tax credit would increase, not decrease, the State's revenue. *Id.* at 93. Second, the Court stressed that the plaintiffs were "third parties" who objected to the provision of credits to *other* taxpayers—not taxpayers objecting to their own tax liability. *Id.* at

93, 108. And third, because the challenge was based on the Establishment Clause, not state tax law, the plaintiffs had "not asked the District Court to interpret any state law." *Id.* at 106 n.8. The Court explained that the TIA had never been raised, and federal jurisdiction never questioned, in a host of cases alleging that tax laws violated the Establishment Clause or improperly used race-based classifications—disputes in which the analysis did not turn on tax doctrine. *Id.* at 93-94, 110-12.

What little *Hibbs* had to say about comity is contained in two footnotes. In footnote 9, the Court observed:

> [T]his Court has relied upon "principles of comity," Brief for Petitioner 26, to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection. See *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 107-108 (1981) (Missouri taxpayers sought damages for increased taxes caused by alleged overassessments); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 296-299 (1943) (plaintiffs challenged Louisiana's unemployment compensation tax).

Id. at 107 n.9. Then, in footnote 11, the Court discussed several lower court cases that Arizona invoked to support the view that, for TIA purposes, "no line should be drawn between challenges that would reduce revenues and attacks that might

augment collections." *Id.* at 109 n.11. The Court explained that two of those cases—*In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), and *United States Brewers Ass'n v. Perez*, 592 F.2d 1212 (1st Cir. 1979)—did not rely on the TIA (and that *U.S. Brewers* expressly rested on comity grounds), but the Court offered no further explanation. Finally, the Court elsewhere cited *Fair Assessment* as a case in which "[f]ederal-court relief . . . would have operated to reduce the flow of state tax revenue. *Id.* at 106.

The *Hibbs* Court did not directly address the relationship between comity and the TIA, nor did it suggest, in citing *Fair Assessment* and *Great Lakes*, that its decision affected those earlier holdings. It certainly did not purport to overrule any prior decisions. On the contrary, the decision vehemently denied that it was effecting a sea change, explaining that the *opposite* approach would have called a line of precedent into doubt. *Id.* at 93 (citing, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954)); see also *Hibbs*, 542 U.S. at 112-13 (Stevens, J., concurring). It is doubtful that the Court would have expressed stare decisis concerns for one "decades-long understanding," *id.* at 112, while tacitly overruling another.

Had the *Hibbs* Court intended to eliminate or narrow the comity doctrine in tax cases, it would have said so explicitly. "[W]hen this Court reexamines a prior holding," it does not do so furtively. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992). Rather, it "detours from the straight path of *stare decisis*" only for reasons that are clearly articulated. *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). Nor does the Court

leave it to the lower courts to conclude that "more recent cases have, by implication, overruled an earlier precedent," for it is alone this Court's "'prerogative [to] overrul[e] its own decisions.'" *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted). In light of those principles, it is evident why the *Hibbs* Court did not carefully justify its elimination of the comity doctrine: because it did not eliminate the comity doctrine.

Instead, the natural reading of *Hibbs*'s cursory reference to comity is that the Court left the comity doctrine exactly where it found it. The Court in footnote 9 simply explained that the same factors that made the case a poor fit under the TIA also made it a poor fit for comity. Never before had the Court invoked either the TIA *or* comity principles to preclude a federal challenge by a third party who objected to a tax credit received by others rather than to her own liability under a revenue-raising tax provision, with no dispute as to the operation of tax doctrine. See *DirecTV*, 513 F.3d at 127; *Hill v. Kemp*, 478 F.3d 1236, 1249 (10th Cir. 2007). The *Hibbs* Court therefore said that the unusual case before it cleared *both* the TIA *and* comity hurdles—not that the second hurdle no longer exists.

b. The Sixth Circuit offered no sound reasons for limiting comity in light of *Hibbs*.

The Sixth Circuit offered three principal reasons for disregarding *Fair Assessment*'s clear rule and concluding that *Hibbs* restricted or eliminated the comity doctrine. None of those rationales withstands scrutiny.

First, the Sixth Circuit found it hard to reconcile "a sweeping reading of *Fair Assessment*" with "*Hibbs*'s instruction that comity guts federal jurisdiction only when plaintiffs try to thwart tax collection." Pet. App. 11a. As explained above, however, no tension exists between *Hibbs* and *Fair Assessment*. The *Hibbs* Court merely observed that the case before it was unlike any it had seen before, including in the comity context. 542 U.S. at 107 n.9. Thus, even under the robust comity rule described in *Fair Assessment*, the third-party complaint at issue in *Hibbs* could proceed in federal court. Put another way, the *Hibbs* Court simply held that Arizona's arguments fared no better under the comity rule than under the TIA. See *id.*

Second, the Sixth Circuit worried that "an unduly broad view of comity would render an Act of Congress—the Tax Injunction Act—effectively superfluous, as its contours would never be dispositive so long as extant 'comity principles' uniformly barred challenges to state taxation." Pet. App. 11a. But this concern disregards Congress's point in enacting the TIA. As explained in Part A.1 above, Congress was moved to close two specific loopholes that allowed too many state tax challenges to enter the federal courts—(1) the requirement that an "adequate legal remedy" be cognizable in federal court, and (2) the view that available state remedies were inadequate. See *Fair Assessment*, 454 U.S. at 109; *id.* at 129 n.15 (Brennan, J., concurring in the judgment). Congress therefore adopted the TIA to shore up the comity doctrine in a set of cases where it had eroded, but it left in place the federal courts' broader equitable authority to stay their hand in state tax cases. See *Miller v. French*, 530 U.S. 327,

340 (2000) (requiring a clear statement for a statute to displace federal courts' equitable powers).

The result is a statute that works in tandem with background equitable principles. When federal courts confront a state tax challenge, they ordinarily ask first whether the TIA divests them of jurisdiction. See, e.g., *California v. Grace Brethren Church*, 457 U.S. 393, 411 (1982); *Marvin F. Poer & Co. v. County of Alameda*, 725 F.2d 1234, 1235-36 (9th Cir. 1984). If the challenge falls within the core set of cases that drove Congress to enact the statute—"*i.e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes," *Hibbs*, 542 U.S. at 107—the TIA has fulfilled its role as "a partial codification of the federal reluctance to interfere with state taxation." *NPTC*, 515 U.S. at 590. If not, then the courts turn to the broader comity doctrine. See, e.g., *Gillis*, 836 F.2d at 1005.

This customary order of operations—statute first, then background principles—is common. For instance, even if the terms of the Anti-Injunction Act, 28 U.S.C. § 2283, permit a federal court to enjoin parallel state proceedings, *Younger* abstention and background comity principles nonetheless may require the federal court to stay its hand. See *Mitchum v. Foster*, 407 U.S. 225, 229-30, 243 (1972); see also *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 151 (1988) ("[T]he fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue."). Similarly, even when the Johnson Act, 28 U.S.C. § 1342—which divests federal courts of jurisdiction to enjoin public utility commission orders—does not bar federal jurisdiction

over an action, "[t]he usual rule of comity must govern." *Aluminum Co. of Am. v. Utils. Comm'n of N.C.*, 713 F.2d 1024, 1028-29 (4th Cir. 1983). Just as there is no suggestion that this approach guts either the Anti-Injunction Act or the Johnson Act, neither does it leave the TIA feckless. Instead, it appropriately gives effect to both the TIA *and* principles of comity.

The Sixth Circuit had a final reason for its parsimonious view of comity following *Hibbs*. The Sixth Circuit noted this Court's concern in *Hibbs* that, under an expansive reading of the TIA, a series of earlier Establishment Clause and race-discrimination precedents would have been jurisdictionally barred. Pet. App. 12a. "This same logic applies to comity," the appeals court said, for a broad comity bar likewise would have barred the earlier precedents cited by *Hibbs*. *Id.* On this point, however, *Hibbs* is entirely consistent with *Fair Assessment*, which reserved the question "whether the comity spoken of would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race." 454 U.S. at 107 n.4. *Hibbs* simply illustrates the rare case contemplated by *Fair Assessment*.

Nothing about *Hibbs*, in short, calls *Fair Assessment* or the independent comity doctrine into question. And everything about this case shows that it belongs in state court.

3. Comity principles apply to this case.

The overriding purpose of the comity doctrine, as explained in Part A.1 above, is to avoid unwarranted intrusion into state tax policy. Several different aspects of this case demonstrate that, if Respondents' suit were allowed to proceed in federal court, it would entail precisely the kind of disruption that the comity rule exists to prevent. See *Fair Assessment*, 454 U.S. at 108, 113. At every step of the way—in both the merits analysis and in crafting a remedy—the district court would need to undertake a fine-grained analysis of Ohio tax and regulatory law.

First, the district court would have to scrutinize Ohio's regulatory regime to address the "threshold question whether the companies are indeed similarly situated for constitutional purposes." *Tracy*, 519 U.S. at 299. As *Tracy* shows, that analysis requires a careful examination of the different businesses' operations and the divergent state regulatory structures that govern LDCs and IMs. *Id.*; see, e.g., Ohio Rev. Code §§ 4905.35 (requiring LDCs to serve all in their territories); Ohio Rev. Code §§ 4905.22, 4905.302; Ohio Admin. Code Ch. 4901:1-14 (regulating LDCs' rates and setting tariffs on a "cost-plus" basis). Those regulatory differences are rooted in state *utility* law, not just state tax law, and, by virtue of other jurisdictional provisions, federal district courts have little experience with such law. See Natural Gas Act of 1938 § 1(b), 15 U.S.C. 717(b) (exempting local distribution of natural gas from federal regulation and providing express Commerce Clause exemption

for state regulation of retail natural gas sales); *Tracy*, 519 U.S. at 291, 305 (noting NGA exemptions); see also Johnson Act of 1934, 28 U.S.C. § 1342 (barring federal court jurisdiction to enjoin public utility commission orders).

Second, the district court would need to understand how different state taxes operate in order to conduct its discrimination analysis. Respondent Commerce Energy argues, for example, that the gross receipts tax, or GRT (which applies to LDCs), should be compared to the sales tax (which applies to IMs). J.A. 13-15 (Compl. ¶¶ 40-48). But under Ohio law, the GRT is analogous to the State's commercial activity tax, or CAT, because both the GRT and the CAT are franchise taxes imposed on the privilege of doing business; neither is a tax on sales, see *Ohio Grocers Ass'n v. Levin*, 123 Ohio St. 3d 303, 303 (2009). Moreover, because the GRT is not the only tax that the LDCs pay, the district court would need to review two other taxes imposed on LDCs—the "MCF tax," charged on the volume of gas sold, and a personal property tax, Ohio Rev. Code § 5727.811, § 5727.06—to determine the evenness of Ohio's tax system. And to the extent Respondents complain that IM customers must pay sales tax of up to 7.5%, while customers of the LDCs allegedly pay only the passed-along GRT of 4.75%, JA 14 (Compl. ¶ 45), that claim hinges on the rate formula that Ohio's public-utilities law sets for LDCs. See Ohio Admin. Code § 4901:1-14-05. Finally, the district court would need to determine whether any discrimination that might seem to exist is overcome because the LDC-specific taxes implicate the compensatory tax doctrine. See *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 n.2 (1996).

Third, even if the district court were to find an equal protection or dormant Commerce Clause violation (and the State disputes that either exists), any remedy it might craft would necessarily offend comity principles. The most obvious remedy would be to reduce Respondents' tax liability, but Respondents disclaim any desire for that remedy in order to call themselves "third parties." Instead, Respondents ask for "[a]n order invalidating as a matter of law the [allegedly unconstitutional] exemptions/exclusions." J.A. 20 (Compl., prayer for relief). But that "approach . . . could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 818 (1989); accord *U.S. Brewers*, 592 F.2d at 1215. If the Ohio tax law is unconstitutional, the Ohio "courts are in the best position to determine how to comply with the mandate of equal treatment." *Davis*, 489 U.S. at 818.

What is more, the solution could not be as simple as Respondents suggest. Respondents ignore the divergent regulatory regime for LDCs and complain simply that the IMs' customers pay a higher tax rate of up to 7.5% (differing by county), while the LDCs' customers pay a different, substitute tax—the GRT—at a rate of only 4.75%. The complaint says not that the LDCs' sales-tax exemption alone is discriminatory, but that the exemption, "at least an exemption over and above what is paid pursuant to the gross receipts tax," discriminates. J.A. 15 (Compl. ¶ 48). A district court could not achieve parity on that claim by just invalidating the LDCs' sales-tax exemption, because

such invalidation, standing alone, would leave the LDCs with much higher taxes.

Instead, the federal court would need to do one of two things. The court could couple the invalidation of the LDCs' sales-tax exemption with an injunction against levying the GRT against the LDCs, requiring both LDCs and IMs to pay the sales tax equally. But the TIA would bar such an injunction, because the order would "enjoin . . . collection of [a] tax under State law." 28 U.S.C. § 1341. Alternatively, the court could take a scalpel to the LDCs' sales-tax exemption and reduce it by however many percentage points are needed, on a county-by-county basis, to eliminate the gap. But such careful tailoring of a state tax code is "just th[e] sort of heavy-handed federal court interference in state taxation that the principle of comity is intended to avoid." *DirecTV*, 513 F.3d at 125.

The Sixth Circuit dismissed concerns about enjoining the LDCs' payment of the GRT by saying that it need not concern itself with what might happen in "a hypothetical future lawsuit" in which the LDCs might "seek[] to enjoin the imposition of other taxes," leading to lost revenue. Pet. App. 7a-8a. But the Sixth Circuit was mistaken in attributing that injunction to a "hypothetical" second lawsuit. It would make little sense for the court in this case to invalidate only one tax exemption and tilt the field the other way, leaving it to the LDCs to start a new case to even things up. Any injunction enforcing "equality," as Respondents posit it, would have to take account of the GRT in its disposition of *this case*. See *Davis*, 489 U.S. at 818 (remanding for

the Michigan courts to determine how to remedy an invalid tax that affected nonparties).

Likewise, Respondents' claim regarding the CAT cannot be resolved by simply invalidating the LDCs' exemption. Ohio law ensures that no company pays two gross receipts taxes on the privilege of doing business. The CAT, which covers most businesses, does not single out LDCs for an exemption; rather, it exempts all businesses that already pay an industry-specific gross receipts tax (such as specific taxes on insurance companies and financial institutions, as well as LDCs and other public utilities). See Ohio Rev. Code § 5751.01(E). Thus, any attempt to level the playing field as to the CAT exemption would require the federal court to consider state laws against duplicate taxation of gross receipts. In other words, forcing LDCs to pay the CAT would trigger a need either to enjoin a different state tax (in violation of the TIA) or to craft a new tax that fills the gap. "This relief would be heavy-handed indeed, and would be a particularly inappropriate intrusion by the federal courts into [Ohio's] tax laws." *DirecTV*, 513 F.3d at 127.

The Sixth Circuit believed that the requested relief here is narrow because "the only entities affected would be four natural gas distributors and the only taxes affected would be a limited class of exemptions that apply to only these four entities." Pet. App. 14a. But that reasoning is wrong on multiple levels. It is premised on the fact that Respondents object to the tax treatment of the natural gas producers, or LDCs, which, by virtue of their natural monopoly and public utility status, are Ohio's sole means of delivering natural gas to Ohio

homes. See *Tracy*, 519 U.S. at 284-85. A challenge to "only" four LDCs' tax treatment, then, is a challenge to *all* LDCs' tax treatment, because those four entities are the only game in town. The State's tax scheme for these entities is therefore a significant policy choice and a major revenue source.

The Sixth Circuit's "only four" reasoning also disregards the fact that Respondents independently challenge the sales tax. See J.A. 14 (Compl. ¶ 45). And the sales tax is levied on the LDCs' customers—the end consumer—not on the LDCs themselves. *Id.*; Ohio Rev. Code § 5739.03(A) (requiring sales tax to be collected by the natural gas vendors from consumers). Thus, Respondents are asking a federal court to invalidate a sales-tax exemption for, and thereby raise taxes on, *millions* of Ohio taxpayers, not just four.

A similar case from Ohio demonstrates that, when properly handled, tax challenges such as Respondents' require a close inspection of state tax law. The Ohio Supreme Court recently rejected a suit resembling this one but brought by another type of company in the natural gas market, an "interstate-pipeline company." *Columbia Gas Transmission Corp. v. Levin*, 882 N.E.2d 400, 412 (Ohio 2008), cert. denied, 129 S. Ct. 896 (2009). In rejecting the dormant Commerce Clause and equal protection claims, the state court carefully analyzed the divergent regulatory and administrative regimes to which Ohio law subjects LDCs and interstate pipeline companies. E.g., *id.* at 415.

If Respondents' challenge goes forward in federal court, the discovery and decision would be much like that in *Columbia Gas*. The suit would

require the federal court to delve into the intricacies of both Ohio's tax law and Ohio's public utility regulatory scheme. This case therefore presents a textbook example of the comity concerns that have long precluded federal review of state tax laws.

B. The Tax Injunction Act divests the federal court of jurisdiction over this case.

Even if comity principles do not preclude the federal courts from entertaining this suit, the Tax Injunction Act does. That is to say, even if the Sixth Circuit was correct that *Hibbs* sets identical standards for both the TIA and comity, the decision below nonetheless conflicts with *Hibbs* itself. Under a proper reading of *Hibbs*, the TIA bars federal jurisdiction over Respondents' complaint.

The chief purposes of the TIA and the comity doctrine are the same. "[T]he statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin*, 429 U.S. 68, 73 (1976). "The principal motivating force behind the Act" was Congress's desire "first and foremost . . . to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell*, 450 U.S. at 522. "[T]he legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration." *Grace Brethren*, 457 U.S. at 409 n.22.

As discussed in Part A above, Congress enacted the TIA to close two loopholes that allowed federal courts to entertain an increasing number of state tax challenges. These federal cases created significant financial distress for the States. When the TIA was enacted, most States required plaintiffs challenging a tax in state court to pay the contested tax under protest and then to seek a refund if they prevailed in litigation. S. Rep. No. 1035, at 1 (1937); see also *Rosewell*, 450 U.S. at 522-23 & n.29. These rules "ma[de] it possible for the States and their various agencies to survive while long-drawn-out tax litigation [was] in progress." S. Rep. at 1. Federal court plaintiffs, by contrast, could avoid paying a challenged tax for the duration of the litigation. Because most of these plaintiffs were foreign corporations (relying on diversity jurisdiction) that generated significant tax dollars for the States, federal court jurisdiction over state tax challenges had the potential to "seriously disrupt State and county finances." *Id.* at 2. States often settled the challenges raised in federal court, rather than waiting for a resolution on the merits, because they had a pressing need for the contested tax revenue. *Id.* Among other things, then, the TIA was intended to enable States both to protect the public fisc and to have a fair opportunity to litigate fully any taxpayer's challenge to a state or local tax. See *Hibbs*, 542 U.S. at 104-05.

The narrow decision in *Hibbs* is consistent with the TIA's history and purpose. The tax credit at issue in *Hibbs* was an educational measure aimed at private schools and was not critical to Arizona's revenue-raising scheme. *Id.* at 92. Given the nature of the challenge before it, "*Hibbs* opened the federal

courthouse doors slightly notwithstanding the limits of the TIA, but it did so only where (1) a third party (not the taxpayer) files suit, and (2) the suit's success will enrich, not deplete, the government entity's coffers." *Henderson v. Stalder*, 407 F.3d 351, 359 (5th Cir. 2005); see also *Hill*, 478 F.3d at 1249 ("Simply put, the Court held that giving away a tax credit is a very different thing than assessing, levying or collecting a tax."). The *Hibbs* Court also repeatedly underscored a third limitation: The subject-matter of the dispute related to the Establishment Clause rather than tax doctrine or the meaning of the challenged statute. E.g., 542 U.S. at 93, 106 n.8, 110-12.

Ohio's tax on natural gas suppliers, by contrast, is a major revenue-raising device, and Respondents' challenge to the tax bears none of the limitations that were dispositive in *Hibbs*. First, Respondents are not third-party challengers to Ohio's tax scheme. The taxpayer-plaintiffs in *Hibbs* were outsiders to the tax credit at issue who did not object to their own tax treatment; instead, they stated a generalized objection to having their tax money "spent" (in the form of credits or forgone revenue) on a program that they believed advanced religion. *Id.* at 93. The Court accordingly termed the *Hibbs* plaintiffs "third parties." *Id.* at 108.

Respondents here, by contrast, are not outsiders to the tax they challenge. They claim that Ohio "maintain[s] its exemption from sales and use taxes for natural gas purchases from LDCs while imposing the same taxes on purchases from retail gas suppliers." Opp. to Cert. at 1. Respondents invoke two different theories to support their

allegation—equal protection and the dormant Commerce Clause. J.A. 18-20 (Compl. ¶¶ 60-67). Under either theory, the root objection is the same: that "state action . . . selects [them] out for discriminatory treatment by subjecting [them] to taxes not imposed on others of the same class." *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946) (equal protection); see also *Dennis v. Higgins*, 498 U.S. 439, 448 (1991) (dormant Commerce Clause). The "right" Respondents evoke "is the right to equal treatment." *Cromwell*, 326 U.S. at 623. And that right presupposes that *they are being treated unevenly vis-à-vis someone else.* See *Tracy*, 519 U.S. at 298. Respondents therefore *do* contest their own tax treatment. That is their whole reason for suing.

The Sixth Circuit appears to have assumed that the "third party" label fit Respondents because they purport not to object to the amount of taxes they owe; they just want the federal court to make the LDCs pay at the same rate. Pet. App. 7a. Even accepting at face value that Respondents are seeking cancellation of the LDCs' benefits rather than tax exemptions of their own—a dubious assumption, for the reasons explained below—the nature of the remedy requested does not change the source of the *right* to that remedy. See *Cromwell*, 326 U.S. at 623. Respondents are only entitled to relief (if at all) because of the way Ohio taxes *them*. If it were otherwise, Respondents would lack standing. See *Tracy*, 519 U.S. at 286-87.

The second critical limitation in *Hibbs* is also lacking here, because Respondents' requested relief implicates the "state-revenue-protective" purposes of

the TIA. 542 U.S. at 106. To begin with, the exercise of "forecasting the likely fiscal effects of variations on state tax policy" is a precarious one. *Hill*, 478 U.S. at 1250. It happened to be unusually straightforward in *Hibbs*, because there the Constitution dictated a one-way ratchet. The *Hibbs* plaintiffs challenged a tax credit on Establishment Clause grounds, and the only possible remedy if plaintiffs succeeded was invalidation of the credit (thereby increasing state revenue), because no court could *expand* an unconstitutional tax credit. But most cases will not be so easy—particularly not at the threshold, when jurisdiction ought to be decided. "[T]here is simply nothing in the TIA or *Hibbs* suggesting that federal courts can entertain challenges to state taxes on the basis of predictive judgments that doing so will not harm state coffers." *Hill*, 478 U.S. at 1250. "Were the case otherwise, judges might be free to become second rate, supply-side economists, hazarding guesses that enjoining this or that revenue raising measure would help rather than hurt overall tax collections." *Id.*

In any event, Respondents' challenge would likely diminish, not enhance, Ohio's coffers. "[A] State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination," *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-40 (1990), and the frequent practice in such cases is "extension, rather than nullification," of the disputed benefit. *Califano v. Westcott*, 443 U.S. 76, 89 (1979); see also *Cherry Hill Vineyards, LLC v. Schneider*, 553 F.3d 423, 435 (6th Cir. 2008). Thus, if Respondents were to succeed on the merits, the district court in this case—regardless of

Respondents' artful pleading—would likely exempt them from the challenged taxes, not terminate the LDCs' exemptions. That relief is particularly likely given that the LDCs are not parties to the federal suit. (The State's motion to join the LDCs as indispensable parties remained pending when the district court dismissed the action on comity grounds.) But even if the district court found for Respondents on the merits and left their tax liabilities untouched, it could achieve equality only by intrusive tailoring of Ohio's tax system. See Part A.3 above. It is not at all clear that such a disruptive remedy would augment Ohio's revenue in the end. See *Gillis*, 836 F.2d at 1008 n.4.

Finally, Respondents' suit is not of the subject-matter type that *Hibbs* allowed to proceed under the TIA. The *Hibbs* Court stressed that the third-party plaintiffs' claims arose under the Establishment Clause, and that federal courts historically had adjudicated such challenges, like racial discrimination claims, without trenching on federalism concerns. 542 U.S. at 93-94, 110-12; see also *Winn v. Arizona Christian Sch. Tuition Org.*, 562 F.3d 1002, 1005 (9th Cir. 2009) (holding, on this Court's remand of *Hibbs*, that "plaintiffs' allegations, if accepted as true, are sufficient to state a claim that Arizona's private school scholarship tax credit program, as applied, violates the Establishment Clause"). As noted above, this Court in *Fair Assessment* left the same space open under the comity doctrine. 454 U.S. at 107 n.4. Respondents' argument, by contrast, is that the State's tax law treats them differently from other natural gas suppliers. By its nature, that claim requires detailed scrutiny of Ohio's tax and utility-regulation systems.

Moreover, the parties here dispute the operation of Ohio's tax law—a factor that similarly distinguishes this case from *Hibbs*. 542 U.S. at 106 n.8.

All of this shows that the Sixth Circuit was mistaken when it shoehorned this case into its reading of *Hibbs*. This Court has never doubted that "the power of taxation is one of vital importance; that it is retained by the States; [and] that it is not abridged by the grant of a similar power to the government of the Union." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425 (1819). Whether by virtue of the comity doctrine or Congress's directive in the TIA, the upshot is the same: Federalism principles require that Respondents bring their challenge to Ohio's tax system in Ohio's courts.

CONCLUSION

For the above reasons, the Court should reverse the Sixth Circuit's decision.

Respectfully submitted,

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December 23, 2009

RESPONDENT'S BRIEF

No. 09-223

In The Supreme Court of the United States

RICHARD A. LEVIN, Tax Commissioner of Ohio,
Petitioner,

v.

COMMERCE ENERGY, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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January 29, 2010

QUESTIONS PRESENTED

1. The Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, generally bars federal district courts from exercising jurisdiction over lawsuits seeking to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." In *Hibbs v. Winn*, 542 U.S. 88 (2004), this Court held that a federal district court may exercise jurisdiction over a constitutional challenge seeking to enjoin a tax credit granted to others, because the TIA prohibits only lawsuits seeking to impede the collection of taxes. In this case, Plaintiffs challenge tax exemptions granted to other taxpayers and do not seek to enjoin the collection of any tax. Was the court of appeals correct in concluding that the TIA does not bar this suit?

2. There are times when this Court has applied principles of comity to prohibit a federal district court from exercising jurisdiction over state tax cases, without reliance upon the TIA. In *Hibbs*, however, this Court held that comity principles did not block a lawsuit seeking to enjoin a tax credit on constitutional grounds, noting that the Court has relied upon comity principles "only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." 542 U.S. at 107 n.9. Was the court of appeals correct in holding that comity does not bar this lawsuit, which does not seek to arrest or countermand state tax collection?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents state as follows:

Respondent Commerce Energy, Inc. is a California corporation and is a wholly-owned indirect subsidiary of Just Energy Income Fund. Just Energy Income Fund is an open-ended, limited-purpose trust established under the laws of Ontario, Canada. Trust units of Just Energy Income Fund are traded on the Toronto Stock Exchange. As of December 31, 2009, Acuity Investment Management Inc. ("Acuity") holds approximately 11.81% of the units of the Fund. Acuity publicly reports that the units were acquired in the ordinary course of business for investment purposes and not for the purpose of exercising control or direction over the Fund. Other than Acuity, to the knowledge of the Just Energy Income Fund, no publicly held company owns 10% or more of the trust units in Just Energy Income Fund.

Respondent Interstate Gas Supply, Inc. is not a publicly traded company, has no parent company, and no publicly held company owns 10% or more of its stock.

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STATUTORY PROVISIONS INVOLVED

In addition to the Tax Injunction Act (quoted at Pet'r Br. at 1), this case involves 28 U.S.C. § 1331, which reads as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

Ohio's Competitive Natural Gas Market.

Natural gas is the energy source most Ohioans use to heat their homes and a major source of energy and power used by industrial and commercial businesses in Ohio. J.A. 3. Ohio's current competitive market for the sale of natural gas to residential and industrial users is relatively new. Traditionally, both industrial and residential consumers could purchase natural gas from only one source: the local utility, also known as the local distribution company ("LDC"). J.A. 4. Under the historical approach, the LDCs charged a "bundled" price for both (1) the natural gas commodity itself and (2) the service of delivering the commodity through its network of natural gas pipelines and distribution facilities. *Id.*

Beginning in the 1970s, Ohio granted certain large and mid-sized industrial consumers the authority to purchase their natural gas from independent natural gas marketers rather than from the LDC. J.A. 4-5. These independent marketers did not hold themselves out to the public at large, and the LDCs continued to service all

residential and the vast majority of business consumers in the state. J.A. 5.

After authorizing pilot programs in the late 1990s, Ohio revolutionized the residential market in 2001 by creating Ohio's Consumer Choice program. J.A. 6. Through this program, Ohio sharply curtailed the LDCs' monopoly and extended a competitive market-based system to most residential natural gas consumers in Ohio. J.A. 6-7; Ohio Rev. Code § 4929.01 et seq. The centerpiece of the program is the "unbundling" of the sale of the natural gas commodity from the service of delivering that gas to the consumer. J.A. 6-7. Residential and business consumers alike now have a choice to purchase their gas from either the LDC that serves their area or from a non-utility gas supplier. The Ohio Revised Code labels the latter group "retail natural gas suppliers" (hereinafter "retail suppliers"). J.A. 7-8; Ohio Rev. Code § 4929.01(N). Retail suppliers must be certified biennially by the Public Utilities Commission of Ohio ("PUCO") and, like LDCs, are now subject to significant PUCO oversight with respect to commodity services provided. J.A. 9. LDCs continue to own and operate the local network of distribution pipelines that run to homes. J.A. 8. Thus, LDCs continue to deliver natural gas to consumers, whether the consumer purchases the gas from the LDC or from a retail supplier. J.A. 8.

Residential consumers continue to receive a single monthly gas bill from their LDC separately reflecting the price of the commodity itself and the price the LDC charges for delivery. J.A. 8-9. If a consumer purchases natural gas from a retail

supplier, the bill separately identifies the amount the consumer owes to the retail supplier for the gas commodity itself, and the amount of the applicable sales taxes. *Id.* The LDC remits the full amount to the retail supplier. The monthly bill also reflects the LDC charges for the delivery service including fees and taxes. *Id.*

Accordingly, under Ohio's Consumer Choice program, LDCs and retail gas suppliers now compete directly in all material respects for natural gas commodity sales in Ohio. *See Columbia Gas Transm. Corp. v. Levin*, 882 N.E.2d 400, 415 (Ohio 2008) ("[T]he main competitors of LDCs in the residential and small-business markets are not interstate pipelines. Rather, independent and LDC-affiliated marketers compete with LDCs for commodity sales in this market.").

At the time of the filing of the Complaint, Ohio's Consumer Choice program applied in the areas of the state served by four larger LDCs. J.A. 7. Since then, the PUCO has approved the applications of two LDCs to exit the retail natural gas commodity sales market, and a third LDC has taken steps to follow suit.[1]

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[1] *See In re Application of Dominion East Ohio*, Case No. 07-1224-GA-EXM (Opinion and Order, June 18, 2008), *available at* http://dis.puc.state.oh.us/TiffToPDF/A1001001A08F18B41305E23144.pdf; *In re Application of Vectren Energy Delivery of Ohio*, Case No. 07-1285-GA-EXM (Entry, Aug. 20, 2008), *available at* http://dis.puc.state.oh.us/TiffToPDf/A1001001A08H20B40954D08592.pdf; *In re Application of Columbia Gas of Ohio*, Case No. 08-1344-GA-EXM (Opinion and Order, Dec. 2, 2009), *available at* http://dis.puc.state.oh.us/TiffToPDf/A100

Plaintiffs' Complaint Seeks to Invalidate Certain Discriminatory Tax Exemptions That LDCs Enjoy.

Even though LDCs sell the same exact commodity (natural gas) and deliver it in the same exact manner (through LDC-owned pipelines), Ohio maintains a tax system that treats sales of natural gas from LDCs more favorably than sales by retail suppliers. As described in the allegations of the Complaint (which on a motion to dismiss must be taken as true), this discrimination is effectuated by three types of tax exemptions granted to the LDCs related to their sales of natural gas but not to retail suppliers.

First, retail suppliers must charge and collect the statewide and relevant county "piggyback" sales and use tax on all sales of natural gas to consumers. J.A. 13. Ohio law, however, exempts all sales of natural gas by LDCs from all of these sales and use taxes, and instead, imposes a lower gross receipts tax. J.A. 14. Second, Ohio imposes a commercial activities tax ("CAT") on the gross sales of most Ohio businesses, including retail suppliers. J.A. 15-16. Ohio law, however, exempts LDCs from the CAT. J.A. 16. Third, Ohio law imposes the applicable gross receipts tax on sales of natural gas from an LDC to a retail supplier. J.A. 17. Ohio law, however, exempts sales of natural gas between LDCs from that tax. J.A. 17. The net result is that a consumer can buy the same amount of natural gas, delivered by the same LDC through the same

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pipelines, but if the consumer chooses to purchase the gas from a retail supplier rather than from an LDC, the consumer will pay a higher tax.[2]

Respondents (who will be referred to collectively as "Plaintiffs") brought this lawsuit in the U.S. District Court for the Southern District of Ohio to challenge this discriminatory treatment. Respondents Commerce Energy, Inc. ("Commerce Energy") and Interstate Gas Supply, Inc. ("IGS") are retail suppliers. J.A. 2. Respondent Gregory Slone is a residential purchaser of natural gas from the latter, under Ohio's Consumer Choice program. J.A. 2-3. Since 2001, Commerce Energy, IGS, and other retail suppliers have moved to compete in the restructured free market for sales of natural gas, and a significant percentage of Ohio residential consumers now purchase their natural gas commodity from retail suppliers. J.A. 11.

Plaintiffs challenge the exemptions on two federal constitutional grounds. First, Plaintiffs allege that the exemptions violate the Dormant Commerce Clause because they provide a discriminatory advantage to in-state LDCs at the expense of retail suppliers who are both in and out-of state entities. J.A. 18-19. Second, Plaintiffs allege that the exemptions violate the Equal Protection Clause by discriminating against

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[2] The Commissioner points out that LDCs are subject to two taxes that are not paid by retail suppliers. Pet'r Br. at 6. These taxes, which are unrelated to commodity sales, have no relevance to the jurisdictional issue presented here.

similarly situated businesses without a rational basis. J.A. 19-20.[3]

The relief sought in Plaintiffs' Complaint is limited. Plaintiffs seek a declaration that the exemptions at issue violate the U.S. Constitution and an injunction against enforcement of the exemptions. J.A. 20-21. The Complaint does not seek to enjoin the collection of any tax paid by Plaintiffs or any other taxpayer. Nor do Plaintiffs seek a refund of any taxes they previously paid.

Because Plaintiffs do not challenge their own tax liability, there is no administrative procedure under Ohio law that could grant the relief requested in Plaintiffs' Complaint. Rather, the only alternative state forum to assert the relief requested in Plaintiffs' Complaint is to refile it in state court.

The Decisions of the Courts Below.

The Commissioner never answered the Complaint but instead moved to dismiss the complaint for a lack of jurisdiction on two bases.

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[3] This Court once before addressed a similar argument, but in the context of the old regime, where the LDCs did not compete directly with independent gas marketers for residential sales because residential and small commercial customers did not have the option to purchase the gas commodity from other than an LDC. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997). Because of that, this Court concluded that the gas marketers were not "similarly situated" for dormant commerce clause purposes, and thus the constitutional claims of discriminatory treatment could not be sustained. *Id.* Plaintiffs contend that the drastically different competitive environment today warrants a different result.

First, the Commissioner argued that the Complaint was barred by the Tax Injunction Act ("TIA" or "the Act"), 28 U.S.C. § 1341, which generally prohibits a court from "enjoin[ing] . . . the assessment, levy or collection of any tax under State law." Second, he asserted that general principles of comity and federalism bar the lawsuit even if the TIA does not. The district court rejected the first ground, but accepted the second. Pet. App. 22a-33a. It held that the TIA did not bar this lawsuit, because the TIA is limited to lawsuits seeking to enjoin the collection of a tax. *Id.* at 22a-26a. Nevertheless, the district court dismissed the lawsuit on the ground that principles of federalism and comity compelled it to refrain from adjudicating this case. *Id.* at 19a-33a. No discovery was had and no factual record was developed prior to or in connection with the Commissioner's motion to dismiss.

The U.S. Court of Appeals for the Sixth Circuit reversed. The court of appeals agreed that the TIA was inapplicable, but reversed the district court's holding that comity nevertheless blocks the suit. Pet. App. 3a-18a. This Court's opinion in *Hibbs v. Winn* played a prominent role in both holdings. The court of appeals based its TIA conclusion on this Court's holding that the jurisdictional bar "applies only to 'cases in which state taxpayers seek' to 'avoid paying state taxes' where success would 'operate[] to reduce the flow of state tax revenue.'" *Id.* at 8a (quoting *Hibbs*, 542 U.S. at 106-07). Since Plaintiffs did not contest their own tax liability, and success on their claims would not

reduce state tax revenue, the court held the Act did not apply. *Id.* at 7a-9a.

As to comity, the court of appeals rejected the Commissioner's argument that comity principles "broadly bar from federal court nearly every state-tax challenge." Pet. App. 13a. The court explained that such a reading ignores this Court's teaching in *Hibbs* that comity, too, "strips jurisdiction 'only where plaintiffs have sought district-court aid in order to arrest or countermand state tax collection.'" *Id.* at 17a-18a (quoting *Hibbs*, 542 U.S. at 107 n.9). The court of appeals also observed that the Commissioner's reading would *sub silentio* overrule a series of important cases from the Supreme Court including "possibly *Hibbs* itself," and that it would make the TIA entirely superfluous. *Id.* at 17a-18a.

In so ruling, the court of appeals emphasized that it was not holding that principles of comity are co-extensive with the parameters of the TIA. To the contrary, "principles of comity and federalism sweep somewhat more broadly than the Act." Pet. App. 18a. The court opined that "[t]o determine whether comity and federalism preclude jurisdiction over state taxation claims, courts must determine whether the relief requested in the pleadings would significantly intrude upon traditional matters of state taxation such that dismissal is necessary." *Id.* at 13a-14a. The court concluded that comity did not bar this action, because Plaintiffs' claims were directed to a few limited exemptions that, at the time of the Complaint, affected only four specific LDCs and because the relief sought "would not significantly

intrude upon traditional matters of state taxation." *Id.* at 18a.

The Commissioner unsuccessfully sought rehearing en banc, Pet. App. 1a, and this Court granted review, 130 S.Ct. 496 (2009).

SUMMARY OF ARGUMENT

This Court held in *Hibbs v. Winn*, 542 U.S. 88 (2004), that neither the TIA nor principles of comity barred a federal district court from hearing a lawsuit challenging state tax credits granted to other taxpayers because such suits would not impede the state's collection of tax revenue. This Court reasoned that such a result was mandated by the language and purposes of the TIA and because "this Court has relied upon 'principles of comity' ... to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." 542 U.S. at 107 n.9.

Hibbs requires the same result here. As in *Hibbs*, Plaintiffs challenge the validity of certain tax exemptions benefiting other taxpayers. Plaintiffs' Complaint does not seek to impede the collection of any tax, and on its face, would result in increased revenue to the state.

Nonetheless, the Commissioner contends that both the TIA and principles of comity bar Plaintiffs' suit. In so doing, the Commissioner invites this Court to: (1) limit *Hibbs* to its unique facts, in particular the type of constitutional claims being asserted therein, i.e., Establishment Clause claims; (2) adopt a "robust," yet undefined view of comity

contrary to this Court's historical precedents and divorced from their underlying state revenue-protection rationale; and (3) ignore the relief requested in Plaintiffs' Complaint and speculate that Plaintiffs' suit may ultimately diminish rather than enhance Ohio's coffers. This Court must reject the Commissioner's invitation.

First, the result in *Hibbs* cannot be explained away by limiting its holding to the constitutional claims raised therein. Nothing in *Hibbs* indicates that this Court's TIA and comity analysis was dependent upon the precise nature of the constitutional challenge at stake. Neither the language of the TIA nor its revenue-protective purposes are dependent upon such distinctions. Fundamentally, there is no plausible constitutional theory explaining why the TIA and comity should give favorable treatment to some constitutional claims over others.

Second, as recognized in *Hibbs*, this Court has never applied comity to bar suits seeking to enjoin tax exemptions. Such suits do not offend the principles of comity expressed in this Court's precedent. To be sure, this Court has recognized that there are instances where principles of comity sweep more broadly than the TIA. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). However, this Court has applied comity to bar such suits only where the relief requested sought federal-court aid to arrest or countermand state tax collection. Nothing in this Court's precedent warrants the adoption of the Commissioner's broad view that comity bars any suit that would involve "an unwarranted intrusion

into state tax policy," Pet'r Br. at 27, a standard lacking clarity and impossible to apply, particularly when judged, as here, solely from the face of the Complaint.

Finally, the most rational touchstone for determining whether a court has jurisdiction under the TIA and principles of comity is by reference to the relief requested in the Complaint. A categorical rule that federal courts have jurisdiction over constitutional challenges to tax exemptions and credits is far more certain and amenable to judicial administration than the Commissioner's "unwarranted intrusion" test.

Because the relief sought by the Plaintiffs here would not arrest or countermand state tax collection, this case is barred neither by the TIA nor principles of comity. As a result, this Court should affirm the decision of the court of appeals.

ARGUMENT

I. THE TAX INJUNCTION ACT DOES NOT BAR PLAINTIFFS' SUIT BECAUSE, AS THIS COURT HELD IN *HIBBS*, THE TIA DOES NOT PROHIBIT A SUIT THAT SEEKS TO ENJOIN STATE TAX EXEMPTIONS.

This Court held in *Hibbs* that the TIA bars lawsuits seeking to impede the collection of a tax, but does not bar lawsuits, like this one, seeking to invalidate tax credits granted to other taxpayers. *See infra* Point I.A. The Commissioner urges this Court to read into *Hibbs* two limitations that bear no relation to the text of the TIA or the rationale of

the opinion. *See infra* Point I.B. The Commissioner also urges this Court to reach a different result than in *Hibbs* based on speculation that the district court will actually enjoin the collection of a tax, even though Plaintiffs did not request such relief and the district court would be prohibited from granting it. *See infra* Point I.C. Both arguments fail.

A. This Case Falls Squarely Within the Holding of *Hibbs* Because It Seeks to Enjoin State Tax Exemptions and Thus Does Not Seek to Impede the Collection of State Tax Revenue.

In *Hibbs*, this Court held as a matter of statutory interpretation that the TIA does not prohibit suits that challenge state tax credits. The plaintiffs in *Hibbs*, like Plaintiffs here, were not trying to avoid paying any tax themselves. Rather, the *Hibbs*' plaintiffs were citizens challenging a credit enjoyed by other taxpayers who made donations to school tuition organizations ("STOs"). 542 U.S. at 93-94. The court of appeals held that neither the TIA nor comity precluded federal court jurisdiction over the lawsuit because the plaintiffs were not challenging their own tax liability and thus did not seek to impede the state's receipt of tax revenues. *Winn v. Killian*, 307 F.3d 1011, 1020 (9th Cir. 2002). This Court affirmed. 542 U.S. at 112.

With respect to the TIA, this Court's opinion focused on whether the relief requested fell within the Act's prohibition against actions seeking to "enjoin, suspend or restrain the assessment, levy or

collection of any tax under State law." 542 U.S. at 100. Specifically, the analysis turned on whether the plaintiffs were seeking to enjoin an "assessment," within the meaning of the Act. *Id.* This Court held that they were not, basing its decision on the plain meaning of the word "assessment," the legislative history of the Act, and the Court's precedent in applying the Act. As this Court explained, "in enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent 'federal-court interference with all aspects of state tax administration.'" *Id.* at 104-05 (quoting Brief of Petitioner 20).

This Court rejected any notion that its previous cases applying the TIA could be "fairly portrayed cut loose from their secure, state-revenue-protective moorings." 542 U.S. at 106. Rather, all of the Court's prior TIA cases "involved plaintiffs who mounted federal litigation to avoid paying state taxes or to gain a refund of such taxes." *Id.* at 106. "In sum, this Court has interpreted and applied the TIA only in cases Congress wrote the Act to address, i.e., cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes." *Id.* at 107. Under *Hibbs*, the TIA did not bar the plaintiffs' lawsuit because it did not seek a federal court order impeding the state's collection of tax revenue.

Hibbs dictates the same conclusion here. Like in *Hibbs*, Plaintiffs' Complaint seeks to invalidate

certain tax exemptions applied to others and disclaims any relief that would reduce Plaintiffs' own tax liability. Plaintiffs' lawsuit is no more a challenge to an "assessment" than the lawsuit in *Hibbs*, and this case is no more an appropriate vehicle to cut the TIA loose from its "state-revenue-protective moorings" than was *Hibbs*.[4]

B. The Commissioner's Effort to Limit *Hibbs* to Its Facts Is Unpersuasive.

The Commissioner seeks to limit the holding of *Hibbs* to its facts in two ways. First, he suggests that *Hibbs* applies only to certain constitutional challenges and not others. He reads *Hibbs* as holding that the TIA permits Establishment Clause claims and some claims brought under the Equal Protection Clause—those that are based in racial discrimination—but not others. Pet'r Br. at 38. Second, he asserts that *Hibbs* does not apply equally to all plaintiffs who challenge credits or exemptions, but only to those who have the right motive for filing the lawsuit. Specifically, the Commissioner asserts that those who file suits to

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[4] Amicus Curiae Multistate Tax Commission ("MTC") argues that the TIA should be interpreted to bar any lawsuit "[w]here a statute's unconstitutional effects can be completely cured by the full range of available state tax remedies." Brief for Multistate Tax Commission as Amicus Curiae Supporting Petitioner 7, *Levin v. Commerce Energy* (No. 09-223). According to the MTC, if there is an alternative and fully-compensatory remedy available in state court, the TIA should not be "short-circuited" through a taxpayer's "narrow pleading of the relief sought in federal court." *Id.* at 7-8. MTC's interpretation must be summarily rejected because such an interpretation would rewrite the TIA and would effectively overrule *Hibbs*.

advance a business interest must be treated differently from those who lack such a motive. Pet'r Br. at 35. The Commissioner's effort to limit the holding of *Hibbs* cannot be squared with the language of the Act, this Court's analysis in *Hibbs*, general constitutional principles, or common sense.

The Commissioner's contention finds no support in the statutory language of the Act. The TIA is triggered based upon the relief sought – i.e., whether the challenge seeks to "enjoin . . . the assessment, levy or collection of any [state] tax." The TIA is not triggered by the constitutional provision upon which the relief is sought or by the motive of the plaintiff bringing the suit. The TIA does not prohibit suits aimed at "enjoining the assessment of any state tax *under the Establishment Clause and certain equal protection theories*." Nor does it prohibit suits aimed at "enjoining the assessment of any state tax *where the plaintiff has a business interest in securing such injunction*." It is simply impossible to read the text of the TIA to support the Commissioner's assertion that some lawsuits that challenge state tax exemptions are barred by the TIA while some lawsuits are not.

Nothing in this Court's analysis in *Hibbs* suggests that this Court's decision was dependent upon either the precise nature of the constitutional challenge at stake or a plaintiff's interests in seeking to invalidate the credit. At no point did this Court suggest that Establishment Clause cases have some special status. To be sure, the Court cited numerous Establishment Clause cases, but only to demonstrate that "numerous federal-court

decisions – including decisions of this Court reviewing lower federal-court judgments – have reached the merits of *third-party constitutional challenges to tax benefits* without mentioning the TIA." 542 U.S. at 110 (emphasis added). Likewise, the Court did not mention anything about the plaintiffs' motives in *Hibbs*. The only attribute about the plaintiffs that the Court emphasized was that they were not seeking to block a tax that they were obliged to pay. That was what the Court meant when it identified the plaintiffs as "third parties." *See, e.g., id.* at 108 (explaining that lower courts have also read the TIA to "restrain state taxpayers from instituting federal actions to contest their liability for state taxes, but not to stop third parties from pursuing constitutional challenges to tax benefits in a federal forum") (emphasis added).

Likewise, the Commissioner's effort to limit the holding of *Hibbs* to a subclass of favored constitutional claims and favored motives is completely divorced from the revenue-protective purposes of the Act relied upon in *Hibbs*. Plaintiffs' Commerce Clause claim does not offend the TIA's revenue-protection purposes any more than the *Hibbs* plaintiffs' Establishment Clause claim. Plaintiffs' motive in seeking to prevent Ohio from granting favored tax treatment to in-state LDCs does not offend the TIA's revenue-protection purposes any more than the *Hibbs* plaintiffs' motive to prevent Arizona from subsidizing religious-based education.

The distinctions relied upon by the Commissioner are fundamentally flawed as a

matter of constitutional law and unworkable. The Commissioner fails to provide an explanation, let alone a plausible constitutional theory, as to why a challenge to state tax credits based upon the Establishment Clause should be treated more favorably under the TIA than a challenge to state tax exemptions based on the Commerce Clause. Likewise, the Commissioner fails to explain why the Act would treat some equal protection claims one way and treat others another way. One cannot help but wonder what exactly the hierarchy of constitutional rights proposed by the Commissioner would be and on what this hierarchy would be based. Does the TIA apply to free speech claims? Equal protection claims based upon gender? Due process claims? And what should a federal district court do when a lawsuit alleges both "favored" and "unfavored" claims? In short, the Commissioner's interpretation of *Hibbs* would lead to an unprincipled morass where no litigant and no court would know which claims deserve to be in federal court.

Moreover, the Commissioner's hierarchy of claims and motives creates an odd incongruity with this Court's standing jurisprudence. Typically, the only entity that could challenge a tax is an entity with a concrete financial stake in the outcome. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). Establishment Clause cases are the exception to the rule, in that a citizen can challenge a tax provision on constitutional grounds without having to show any economic stake in the outcome of the dispute. *See Flast v. Cohen*, 392 U.S. 83, 102-03 (1968). The Commissioner is arguing,

however, that the very business interests that give Plaintiffs standing to bring their claims somehow bar them from federal court under the TIA, and that the only reason the plaintiffs in *Hibbs* could sue was that they were granted an exceptional form of "taxpayer standing." *See* Pet'r Br. at 35-36. The Commissioner does not offer any reason why Congress would want to (or why this Court should) grant preferential access to the federal forum to the parties that have the most tenuous standing to sue in federal court.

Not surprising, therefore, the Commissioner cannot cite to a single case where a court has barred a lawsuit that seeks to enjoin state tax exemptions based upon any of the distinctions espoused by the Commissioner here. In fact, lower federal courts interpreting *Hibbs* have held across the board that the test for survival under the TIA is whether the suit seeks to impede the collection of taxes, not whether the plaintiff is a financially disinterested third-party bringing an Establishment Clause or race-based equal protection claim. *See, e.g.*, *Johnson v. Orr*, 551 F.3d 564, 571 (7th Cir. 2008) (TIA did not bar suit by individual taxpayer to challenge a tax law to which he himself was subject, so long as the relief requested did not "impede the collection of taxes or reduce the flow of tax revenue to Illinois"); *Luessenhop v. Clinton County*, 466 F.3d 259, 267-68 (2d Cir. 2006) (rejecting assertion that *Hibbs* was limited in scope to the type of substantive claims presented in that case, and allowing individual taxpayers' due process challenge of state tax notification procedure to proceed as not barred by

the TIA); *BellSouth Telecomm., Inc. v. Farris*, 542 F.3d 499, 501-504 (6th Cir. 2008) (TIA did not bar free speech and Commerce Clause claims challenging state tax statute prohibiting telecommunications providers from identifying state tax on consumers' bills or from collecting tax directly from consumers even though plaintiffs had a financial interest in the litigation).

C. Plaintiffs' Lawsuit Is Not Barred by the TIA Based Upon the Commissioner's Unsupportable Fear That the District Court Will Grant Relief Not Requested by the Plaintiffs and Prohibited by the TIA or Based Upon the Commissioner's Hypothetical Speculation as to the Lawsuit's Eventual Economic Consequences.

In a final effort to fit this case within the parameters of the TIA, the Commissioner contends that the *Hibbs* rule does not apply here because this "challenge would likely diminish, not enhance, Ohio's coffers." Pet'r Br. at 37. In support, the Commissioner makes two remarkable assertions. First, the Commissioner contends that "regardless of [Plaintiffs'] artful pleading," if Plaintiffs are successful on the merits, the district court "would likely exempt [Plaintiffs] from the challenged taxes, not terminate the LDCs' exemptions." *Id.* at 37-38. Second, the Commissioner contends that even if the district court left Plaintiffs' tax liabilities untouched, "it is not at all clear" that in tailoring a nullification remedy the Court would augment Ohio's revenues "in the end." *Id.* at 38. Again, the Commissioner's arguments are not convincing.

First, we know that the district court will not extend the exemptions to Plaintiffs—and enjoin collection of some portion of their tax liability that is prescribed by statute—because it would violate the TIA for the court to do so. The TIA is unequivocal. It does not just bar a court from exercising jurisdiction over a complaint that seeks to enjoin the collection of a tax, but it also expressly bars a court from issuing such an injunction once a case is properly before it. There is no basis to believe that the district court would attempt to fashion a remedy that is both unsought and illegal. And it makes no sense to engraft a non-textual limitation on the TIA's language that is premised on the possibility that a court will violate the TIA's plain command.

Nothing in the cases cited by the Commissioner is to the contrary, as none of the plaintiffs in any of those cases limited their requested relief to a "nullification" remedy and none of those cases were otherwise limited by the TIA. *See, e.g., Califano v. Westcott*, 443 U.S. 76, (1979) (all of the parties agreed that extension was an appropriate remedy in federal lawsuit challenging constitutionality of federal welfare statute); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (lawsuit brought in state court seeking refund of taxes previously paid); *Cherry Hill Vineyards, LLC. v. Lilly*, 553 F.3d 423 (6th Cir. 2008) (federal lawsuit not challenging any state tax statute where plaintiffs, out-of-state wineries, sought to have the same right of direct shipping to consumers extended to them as allowed by in-state wineries). In fact, the cases cited by the Commissioner

actually support, rather than undermine, the authority of the district court to grant the nullification remedy sought by the Plaintiffs in this case.

Second, neither the text of the TIA nor the rationale of *Hibbs* suggests that the outcome of the jurisdictional inquiry depends upon the analysis of hypothetical consequences of the lawsuit beyond looking at the *relief requested* in the Complaint. *Hibbs* did not do that. Rather, in framing the question, *Hibbs* recounted the allegations of the complaint and then asked whether "[t]aking account of the prospective nature of the relief requested, does respondents' suit, in 28 U.S.C. § 1341's words, seek to 'enjoin, suspend or restrain the assessment, levy or collection of any tax under State law?'" 542 U.S. at 99-100 (emphasis added). The Commissioner's speculation as to the ultimate effect Plaintiffs' lawsuit might have on the state's coffers invites this Court to engage in the very exercise that the Commissioner insists courts should be careful not to undertake: becoming "'second rate, supply-side economists, hazarding guesses that enjoining this or that revenue raising measure would help rather than hurt overall tax collection.'" Pet'r Br. at 37 (quoting *Hill v. Kemp*, 478 F.3d 1236, 1250 (10th Cir. 2007)).[5] In fact, the

[5] The speculative nature of the Commissioner's hypotheticals about the possible result of the litigation if Plaintiffs are successful is underscored by the market change referenced above in Statement of the Case. Many factors may influence the ultimate result. Nonetheless, the immutable fact is that Plaintiffs do not seek relief which would "arrest or

dangers are more pronounced here, because the Commissioner is asking this Court to second guess the financial impact of a lawsuit that on its face would result in an increase in tax revenue. In short, the only rational touchstone for determining whether a court has jurisdiction under the TIA is the relief being requested. This Court should reject the Commissioner's suggestion that the TIA's jurisdictional lines depend upon some prediction of what economic consequences might develop "in the end." Pet'r Br. at 38.

Plaintiffs' lawsuit falls outside the type of cases barred by the TIA because the suit seeks to enjoin tax exemptions granted to others and seeks no relief that would impede the collection of state tax revenue. Accordingly, the decision of the court of appeals holding that the TIA does not bar this suit should be affirmed.

II. PRINCIPLES OF COMITY DO NOT BAR PLAINTIFFS' ACTION BECAUSE IT DOES NOT SEEK TO ARREST OR COUNTER-MAND STATE TAX COLLECTION.

The Commissioner posits that "[t]he central question in this case is whether comity principles remain independently vital after the Court's decision interpreting the TIA in *Hibbs*." Pet'r Br. at 2. Thus, the central theme pervading his brief is that "the Sixth Circuit held here that *Hibbs* effectively rendered the comity doctrine a dead letter in tax cases," *id.*, that "*Hibbs* . . . overruled, *sub silentio*, an unbroken line of comity cases

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counter-mand" state tax collection and the district court could not, consistent with the TIA, order such relief.

extending back [to] 1871," Pet'r Br. at 20, and "restricted or eliminated the comity doctrine," Pet'r Br. at 23. The problem is that the Sixth Circuit held no such thing, and Plaintiffs do not embrace any such notion.

The court of appeals acknowledged that "principles of comity and federalism sweep somewhat more broadly than the Act," Pet. App. 18a, and "thus they sometimes bar federal challenges to state taxation where the Act would not," *Id.* at 9a. The court correctly observed that "the pertinent question is whether the claims and requested relief fall within that sweep." *Id.* at 18a. All this was in keeping with this Court's precedents holding that the comity doctrine can block a lawsuit even when the TIA does not. Thus, for example, all parties agree that this Court has held that comity bars a damages action seeking essentially to countermand a tax collection, whether or not the TIA bars such a suit, *Fair Assessment*, 454 U.S. 100 (1981), and the same goes for a suit seeking declaratory judgment that a tax collection is impermissible, even though the TIA says nothing about declaratory judgment actions, *see Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). Neither the Sixth Circuit nor the other appellate circuits aligned with it on this issue dispute the continued vitality of these cases. *See, e.g., Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 18 (1st Cir. 2009) ("This is not to say that principles of comity are of no further effect. As recognized in *Hibbs*, *Fair Assessment* is still good law . . . .").

But the Commissioner cannot prevail here just by making the uncontroverted point that there are circumstances where comity can bar a lawsuit even though the TIA does not. The question presented in this case is whether comity bars this lawsuit even though the TIA does not. This Court in *Hibbs* held that the suit before it was not barred by principles of comity. *See infra* Point II.A. The holding in *Hibbs* was that comity principles do not bar a lawsuit, like this one, that does not seek to arrest or impede the collection of state taxes. *See infra* Point II.B. Even if *Hibbs* could be read more narrowly, however, this Court should now conclude that comity principles do not block any lawsuit meeting those same criteria, because that categorical rule is consistent with comity precedents and principles and has the virtue of clarity. *See infra* Point II.C. In any event, even under the Commissioner's multi-factor test for "undue interference" with state tax functions, federal jurisdiction would be proper, because entertaining this challenge does not unduly interfere with the state's tax operations. *See infra* Point II.D.

A. As the Commissioner Agrees, This Court Held That the Suit Before It in *Hibbs* Was Not Barred by Principles of Comity.

The Commissioner and Plaintiffs agree that this Court's opinion in *Hibbs* was not just about the TIA, but also about comity. While the opinion devoted more attention to the TIA, the Commissioner concedes that this Court found that the claims in *Hibbs* "cleared *both* the TIA *and*

comity hurdles." Pet'r Br. at 23. That much is evident not just from the opinion's footnotes addressing comity, *see Hibbs*, 542 U.S. at 107 n.9, 109 n.11, but also from the course of the litigation.

Hibbs arrived before this Court as a challenge to jurisdiction rooted in both the TIA and comity. The Ninth Circuit addressed at length the district court's "alternative ground for its dismissal of this action, that principles of comity preclude lawsuits involving potential federal court interference in the administration of state tax systems." *Winn*, 307 F.3d at 1018. Presaging this Court's eventual opinion, the court of appeals held that this Court's opinions in *Fair Assessment* and *Great Lakes* were concerned with a federal court hindering "the state's ability to collect revenue" and that "comity does not bar plaintiffs' attempt to vindicate the important constitutional rights at issue" in a case involving a tax credit. *Id.* at 1019-20.

The question presented in both the certiorari petition and the petitioner's merits brief was:

> Did the Ninth Circuit err in holding . . . that the Tax Injunction Act . . . *and principles of comity* that traditionally restrain federal judicial interference with state tax systems do not require district courts to dismiss constitutional challenges to state tax credits that directly impact the administration of a State's tax system?

Petition for Writ of Certiorari at i, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809) 2003 WL 22428272; Petitioner's Brief on the Merits at i, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809)

2003 WL 22766739 (emphasis added). The petitioner's merits brief included a separate argument that "even if the Tax Injunction Act did not preclude Respondents' federal-court action, the principles of comity would." *Id.* at 26. The respondents joined the issue, arguing that "Principles of Federal-State Comity Do Not Deprive The District Court Of Subject Matter Jurisdiction." Respondents' Brief on the Merits at 39, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809) 2003 WL 23052002. Both parties also addressed comity at oral argument. Transcript of Oral Argument at 28-29, 45-46, *Hibbs v. Winn*, 542 U.S. 88 (2004) (No. 02-1809) 2004 WL 193039.

Consequently, as the Commissioner concedes, this Court's statements about comity in *Hibbs* were not passing dicta, as the district court and the Fourth Circuit have suggested. *See* Pet. App. 28a; *DIRECTV, Inc. v. Tolson*, 513 F.3d 119, 127-28 (4th Cir. 2008) (stating that comity "was simply not before the Supreme Court in *Hibbs*"). Rather, they represent a considered holding that addressed one of the two specific questions presented in that case. The question before the Court now is exactly how broad that holding was. Was it a narrow comity holding limited to the unique facts of *Hibbs* (as the Commissioner asserts) or was it a holding that applied to any lawsuit that is not directed at arresting or countermanding state tax collection (as Plaintiffs assert)?

B. The Holding in *Hibbs*, That Comity Does Not Bar a Suit Unless the Suit Is Directed at Arresting or Countermanding a State Tax, Was Not Limited to the Particular Circumstances in *Hibbs*.

The parties' dispute about the scope of this Court's comity holding in *Hibbs* mirrors, in most respects, their dispute about the scope of this Court's TIA holding in *Hibbs*. The natural place to start is with what this Court *said* in rejecting the comity argument. It held: "[T]his Court has relied upon 'principles of comity' . . . to preclude original federal-court jurisdiction *only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection*." *Hibbs*, 542 U.S. at 107 n.9 (emphasis added). In support of this holding, this Court cited two cases. The first was *Fair Assessment*, which it characterized as a case where "taxpayers sought damages caused by alleged overassessments." *Id.* The other was *Great Lakes*, which it characterized as a "challenge[]" to a state "unemployment compensation tax." *Id.* If, as the parties agree, *Hibbs* included a holding rejecting a comity defense, then the most natural reading of this holding is that comity principles preclude jurisdiction only where, as in *Fair Assessment* and *Great Lakes*, the "plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." *Id.*

The Commissioner observes that "[t]he Court in footnote 9 simply explained that the same factors that made the case a poor fit under the TIA also made it a poor fit for comity." Pet'r Br. at 23. But,

as is explained above, what made the case a poor fit under the TIA, too, was that the plaintiffs were not seeking "district court aid in order to arrest or countermand state tax collection," *Hibbs*, 542 U.S. at 107 n.9—that the TIA, too, covers only those situations where "taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority," where the lawsuit is directed at arresting "the collection of state taxes." *Id.* at 105 (citation and internal quotes and brackets omitted).

As he does in addressing the TIA, the Commissioner asserts that the *Hibbs* comity holding is to be found not in what the Court *said* about comity—nor, for that matter what it said about the TIA—but in some unspoken limitations to be extracted from the peculiar facts of the case. Specifically, the Commissioner asserts that "[t]hree factors were critical" to the Court's comity holding. Pet'r Br. at 20. The first is that "the measure at issue was a tax *credit*," and a "judgment invalidating a tax credit would increase, not decrease, the State's revenue." *Id.* The second is "that the plaintiffs were 'third parties' who objected to the provision of credits to *other* taxpayers—not taxpayers objecting to their own tax liability." *Id.* This second factor is nothing but a restatement of the first, and both are easily satisfied in this case. Where, as here and in *Hibbs*, a party challenges a tax benefit that has been granted "to other taxpayers," and does not object to its "own tax liability," the consequence is relief that will "increase, not decrease, the State's revenue." *Id.*

The clincher for the Commissioner, then, appears to be the third supposed factor: "[T]he challenge was based on the Establishment Clause, not state tax law." Pet'r Br. at 21. But as in the TIA context, the Commissioner fails to offer any evidence that this Court considered that factor important, nor does he explain why principles of comity would give favorable treatment to Establishment Clause claims over other constitutional claims. The alleged intrusion, if any, on state sovereignty is the same whether a federal court strikes a tax credit on the basis of the Establishment Clause or whether it strikes the same statute on the basis of its neighbor, the Free Speech Clause, or the Commerce Clause, or any number of other clauses of the U.S. Constitution. Surely, principles of comity do not give Establishment Clause challenges primacy just because there have been "a host of cases alleging that tax laws violated the Establishment Clause." *Id.* at 21.

Nor does some critical distinction lie in the fact that "the plaintiffs [in *Hibbs*] had 'not asked the District Court to interpret any state law.'" *Id.* at 21 (quoting *Hibbs*, 542 U.S. at 106 n.8). The Court's response was that the plaintiffs in that case "have not asked the District Court to interpret any state law-there is no disagreement as to the meaning of [the Arizona statute], only about whether, as applied, the State's law violates the Federal Constitution." *Id.* Similarly, as discussed *infra* Part II.D., prosecution of the instant case will not require the district court to interpret any state law as suggested by the Commissioner. Pet'r Br. at 31.

Any constitutional challenge, whether based upon the Establishment Clause or any other constitutional provision, requires the reviewing court to *read* the state statute and understand what it means.

C. Comity Should Not Preclude Jurisdiction Where the Suit Does Not Seek to Arrest State Tax Collection.

Even if there were a way to read the comity ruling in *Hibbs* as a narrow holding that was only on the facts of the particular case then before the Court, all that would mean is that this Court now confronts afresh the broader question whether, consistent with principles of comity, federal courts may exercise jurisdiction over lawsuits seeking to enjoin a tax exemption without seeking to arrest or countermand tax collections. The answer is yes, because (1) this Court has never applied comity to bar such a suit, and such suits do not offend principles of comity expressed in this Court's precedents; and (2) the alternative is an unpredictable multi-factor test that is unsuitable for jurisdictional determinations at the outset of a case.

1. There is no precedent for applying comity to block a lawsuit directed at enjoining a tax credit or exemption, and such a suit does not implicate the comity concerns expressed in the precedents.

Since 1875, Congress has provided general federal question jurisdiction for the district courts. 28 U.S.C. § 1331 ("The district courts shall have

original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). The statute admits of no exceptions and, as in *Hibbs*, the claims of the Plaintiffs here indisputably arise under the Constitution of the United States. This Court has historically resisted contracting the jurisdiction otherwise explicitly granted by Congress except on the basis of compelling interests—and, even then, typically only on the basis of principles that are so longstanding that one would expect that Congress was aware of them and intended to embrace them. *See Owen v. City of Independence*, 445 U.S. 622, 637 (1980) (finding that "a tradition of [common-law] immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine'" when Congress enacted 42 U.S.C. § 1983) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)). That is why this Court, in discerning the extent to which comity contracts federal jurisdiction, has historically invoked cases, such as *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108 (1871), that predate § 1331, and cases that predate the TIA. *See, e.g.*, *Fair Assessment*, 454 U.S. at 102 (citing and examining *Dows*); *Id.* at 103 (analyzing cases that preceded the enactment of the TIA).

The Commissioner repeatedly makes a similar point when he insists that "the Court [in *Hibbs*] left the comity doctrine exactly where it found it," and that this Court's point in *Hibbs* was that it is inappropriate to apply principles of comity where "[n]ever before had the Court invoked either the

TIA or comity to preclude a federal challenge" of the sort it confronted there. Pet'r Br. at 23. These useful guideposts are dispositive, for the same is true here: this Court has "never before . . . invoked the TIA or comity to preclude a federal challenge" to a credit or exemption, nor to any case where the plaintiff was not trying to arrest or countermand its own tax liability. The proof lies, again, in this Court's observation that "this Court has relied upon 'principles of comity' . . . to preclude original federal-court jurisdiction only when *plaintiffs have sought district-court aid in order to arrest or countermand state tax collection*." *Hibbs*, 542 U.S. at 107 n.9 (emphasis added). Even if, as the Commissioner posits, this was not a definitive holding, it was an authoritative statement of historical fact. *Coors*, 562 F.3d at 17 ("The Court's statements [regarding comity] were not made in connection with narrowly construing the facts of the case, but rather were made as part of a survey of the state of the law.").

This Court's statement of historical fact is, of course, correct—and it applies to every case the Commissioner invokes in support of his position. In *Great Lakes*, for example, a taxpayer brought a declaratory judgment action to challenge his obligations under a state unemployment tax. *Great Lakes*, 319 U.S. at 294-95. This Court expressed the view that by enacting the TIA, Congress "recognized and gave sanction to" the practice of federal equity courts to deny injunctive relief to a state taxpayer where the state had set up an adequate remedy at law. *Id.* at 298-99. Recognizing that the text of the TIA spoke in terms

of injunctive relief, this Court concluded that it was unnecessary to construe the language of the TIA to apply to declaratory judgments because "those considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure." *Id.* at 299.

Fair Assessment, too, fits this mold. Taxpayers there sought damages under 28 U.S.C. § 1983 for alleged overassessments of their property resulting in higher taxes. The Court concluded that, as in *Great Lakes*, it was unnecessary to decide whether the TIA, standing alone, would preclude such cases because "the principle of comity bars federal courts from granting relief in such cases." *Fair Assessment*, 454 U.S. at 107. In a passage the Commissioner repeatedly invokes, this Court "recognized the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *Id.* at 102. But this Court then explained that federal interference with state tax *collection* was its primary concern:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the *modes adopted to enforce the taxes levied should be interfered with as little as possible*. Any delay in the proceedings of the officers, upon whom the duty is devolved of *collecting the taxes*, may derange the operations of government, and

> thereby cause serious detriment to the public.

Fair Assessment, 454 U.S. at 102, (quoting *Dows*, 78 U.S. (11 Wall.) at 110) (emphasis added). Paradoxically, the Commissioner invokes *Dows* in support of his position. Pet'r Br. at 10. He cites it for the proposition that "this Court has applied principles of comity to preclude federal courts from entertaining intrusive challenges to state tax laws" for well over a century. Pet'r Br. at 10. But he neglects to note that *Dows* involved a complaint to enjoin collection of a tax levied on the plaintiff, and that it refers emphatically to the dangers of a court interfering with "the modes adopted to enforce the taxes levied" and "collecting the taxes." *Dows*, 78 U.S. (11 Wall.) at 110.

The same is true of each of the other cases the Commissioner cites for the broad proposition that comity is not just directed at protecting state tax *collections*, but is a "robust . . . doctrine" that "bar[s] intrusive review of state tax law," generally, Pet'r Br. at 19, insulating all "state tax *policy*" from federal review, without regard to its impact on collections. Pet'r Br. at 17 (emphasis added). While the precedents occasionally use broad language about "a proper reluctance to interfere by prevention with the fiscal operations of the state governments," *e.g.*, *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 282 (1909), the simple fact remains that every single case the Commissioner cites involved an effort by a taxpayer to impede the collection of taxes. *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 108 (1871) (bank

owner sought to restrain collection of tax levied on his bank by the City of Chicago); *Boise Artesian*, 213 U.S. at 280 (water supply company sought to enjoin collection of tax that Boise City levied on its operations); *Singer Sewing Machine Co. v. Benedict*, 229 U.S. 481, 483 (1913) (sewing machine company sought to enjoin collection of taxes that Denver, Colorado levied on its operations); *Matthews v. Rodgers*, 284 U.S. 521, 523 (1932) (cotton sellers sought to enjoin Mississippi's collection of tax on buying and selling cotton); *Great Lakes*, 319 U.S. at 294-95 (dredging company sought declaratory judgment to prevent enforcement of state unemployment insurance fund tax on its operations); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 510 (1981) (individual homeowner sought to enjoin collection of property tax assessed on her home); *Nat'l Private Truck Council v. Oklahoma Tax Commission*, 515 U.S. 582, 584 (1995) (non-resident motor carriers sought to enjoin collection of various taxes levied against motor carriers); *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 824 (1997) (corporate financial institutions organized by farmers sought to enjoin collection of Arkansas sales and income taxes on their business). And case after case makes clear that the Court's central concern was interference with collections. *See, e.g.*, *Matthews*, 284 U.S. at 525 (referring to "cases where the suit . . . is brought to enjoin the collection of state tax"); *Rosewell*, 450 U.S. at 527 ("The compelling nature of these considerations is underscored by the dependency of state budgets on the receipt of local tax revenues.").

In sum, what this Court said of the TIA precedents in *Hibbs* applies with even greater force to comity precedents: "[O]ur prior decisions are not fairly portrayed cut loose from their secure, state-revenue-protective moorings." 542 U.S. at 106. If, as the parties agree, the operative principle is that this Court should leave "the comity doctrine exactly where it [finds] it," Pet'r Br. at 23, then jurisdiction should lie here.

2. A categorical rule that federal courts have jurisdiction over constitutional challenges to tax exemptions and credits is far more certain and amenable to judicial administration than the Commissioner's multi-factor test.

Apart from being more consistent with the comity precedents, the categorical rule that federal courts have jurisdiction over constitutional challenges to tax exemptions and credits has other virtues. Most notable among them is the virtue of certainty. Simply by reading the complaint—which on a motion to dismiss is all a court has to go on—the court can immediately discern whether the plaintiff seeks to enjoin or otherwise impede tax collection, or merely to challenge a credit or exemption. This is an important virtue because "[t]he faults of balancing tests are clearest, and perhaps most destructive, in the area of jurisdiction. Vague and obscure rules may permit judicial power to reach beyond its constitutional and statutory limits, or they may discourage judges from hearing disputes properly before them. Such rules waste judges' and litigants' resources better

spent on the merits, as this action itself demonstrates." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring); *see also Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613, 621 (2002) ("Motives are difficult to evaluate, while jurisdictional rules should be clear.").

A categorical rule is the approach that the majority of the circuits that have addressed the issue apply. *See Coors*, 562 F.3d at 18 ("But, since Coors seeks an injunction eliminating an exemption and therefore does not seek to arrest state tax collection, comity is no bar to such a result."); *Levy v. Pappas*, 510 F.3d 755, 762 (7th Cir. 2007) ("In the end, it is not how Levy has described his complaint, but what relief he ultimately seeks, that matters."); *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005) ("Nor do principles of comity bar this lawsuit. The Supreme Court has relied on such principles 'to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection.' *Hibbs*, 542 U.S. at 107 n.9. The Wilburs seek no such relief.").

In contrast, the Commissioner invites the Court to enmesh lower courts and litigants in a veritable jurisdictional morass. The touchstone of the Commissioner's approach is an inquiry into whether a particular case will involve an "unwarranted intrusion into state tax policy." Pet'r Br. at 27. How exactly does a court discern whether the intrusion is unwarranted? The Commissioner does not answer with precision,

because the question is inherently incapable of being answered with precision. He suggests, for example, that the court would need to:

- Determine whether, in resolving the merits of the case, the court would be required to conduct a "granular analysis" of state tax and regulatory policy. Pet'r Br. at 11;
- Discern whether the credit/exemption at issue relates to a major source of state revenue. Pet'r Br. at 32;
- Question whether, at the remedy phase, the court might extend the exemption rather than invalidate it. Pet'r Br. at 29;
- Speculate whether, by assuming jurisdiction and invalidating the exemption at issue, the court might prompt the parties losing the exemption to initiate further litigation in the federal courts that might impact the public fisc. Pet'r Br. at 30.

Many of the factors the Commissioner mentions simply cannot be discerned from the face of a complaint. That is reason alone to reject the Commissioner's approach. *See Grubart*, 513 U.S. at 549; *Lapides*, 535 U.S. at 621 (explaining the need for clear jurisdictional rules). But this nebulous test should be rejected also because it bears no resemblance to the manner in which this Court has routinely addressed jurisdictional issues under the rubric of comity.

D. This Case Satisfies Even the Commissioner's Multi-factor "Undue Intrusion" Test.

Even if comity principles demanded a case-by-case prediction of whether a particular challenge will entail "undue intrusion" into state fiscal operations, this case would still warrant federal jurisdiction.[6]

First, obviously "the district court would need to understand how different state taxes operate in order to conduct its discrimination analysis," Pet'r Br. at 28, just as a court must understand any statutory scheme in order to apply any constitutional analysis to it. But that inquiry does not interfere in any way with state sovereignty. This case does not present any dispute (and certainly the Commissioner points to none) as to what *state law is*, so it will not involve a federal court trying to discern the meaning of ambiguous provisions of state tax law on which the state courts had not yet opined. Everything this Court said, in *Hibbs*, in response to that same argument, applies with equal force here: "[Plaintiffs] have not asked the District Court to interpret any state law-there is no disagreement as to the meaning of [the state statute], only about whether, as applied, the State's law violates the Federal Constitution . . .

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[6] As a practical matter, the Commissioner's approach appears similar to that used by the Sixth Circuit, which analyzed the amount of intrusion that would result if the federal court exercised jurisdiction. Under that analysis, the Sixth Circuit found the Commissioner's objections to jurisdiction here unpersuasive.

That is a question federal courts are no doubt equipped to adjudicate." 542 U.S. at 106 n.8.

Second, for the reasons described above, the Commissioner is wrong in speculating that the district court will grant a remedy that is both different from what the complaint requests and illegal. *See supra* at I.C. And, as the court of appeals held, the prediction that this case might prompt further litigation by other parties that might impact state revenue "is strained, to say the least." Pet. App. 8a; *see also Wilbur*, 423 F.3d at 1110 ("Further, the State prediction about how this action might affect the State's financial bottom line in the future is too speculative to circumvent the holding of *Hibbs*.").

Similarly, the Commissioner is incorrect in arguing that Plaintiffs are asking the federal court to "take a scalpel" to Ohio's tax laws and fashion a remedy to "achieve parity" between the LDCs and the retail supplier. Pet'r Br. at 30, 29. The only way the Commissioner can argue that "any remedy [the district court] might craft would necessarily offend comity principles," Pet'r Br. at 29, is by misstating both the relief requested and the extent of comity limitations on that relief.

The relief that Plaintiffs request is simple and easy to implement: It is a declaration that the exemptions at issue violate the U.S. Constitution and an injunction against enforcement of the exemptions. J.A. 20-21. Plaintiffs do not ask the district court to rewrite Ohio's tax code. Rather, in keeping with this Court's longstanding practices, once that relief is granted, "[t]he State [will be] free

to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined." *McKesson*, 496 U.S. at 51-52; *see also Milliken v. Bradley*, 433 U.S. 267, 280-281 (1977) ("the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."). Once the district court grants the minimal relief requested—to disallow the exemptions—it will be up to the Ohio General Assembly to balance its own interests and determine how best to recast the tax laws, within constitutional constraints.

The Commissioner's bottom line, then, is that even the minimal relief requested—enjoining the exemptions at issue—"'could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court.'" Pet'r Br. at 29 (citing *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989)). If anything is clear from *Hibbs*, it is that merely enjoining an exemption is *not* "beyond the power of a federal court." The holding in *Hibbs* simply cannot be squared with the broad reading of *Davis* contended for by the Commissioner. *See also Coors*, 562 F.3d at 18 ("[S]ince Coors seeks an injunction eliminating an exemption and therefore does not seek to arrest state tax collection, comity is no bar to such a result.").

With respect to the Commissioner's argument that any remedy the district court would order "would necessarily offend comity principles," the Commissioner fails to reconcile that argument with his acknowledgement that *Hibbs* included a holding based on comity. In fact, the relief sought in *Hibbs*

was broader than that sought in this case. *Hibbs*, 542 U.S. at 96. ("Respondents sought injunctive and declaratory relief, and an order requiring the STOs to pay funds still in their possession 'into the state general fund.'"). Nonetheless, the Court affirmed the court of appeals holding that comity did not preclude federal court jurisdiction over the action. *Hibbs*, 542 U.S. at 107 n.9, 112. This case involves tax benefits indistinguishable from those in *Hibbs* and, accordingly, comity should no more bar this action than it did the action in *Hibbs*.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court of appeals.

Respectfully submitted,

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REPLY BRIEF

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In the Supreme Court of the United States

RICHARD A. LEVIN, Tax Commissioner of Ohio,
Petitioner,

v.

COMMERCE ENERGY, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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REPLY BRIEF OF PETITIONER

At the heart of this case is the parties' dispute over the scope of the comity doctrine. Before *Hibbs v. Winn*, 542 U.S. 88 (2004), principles of comity reached more broadly than the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, and would have precluded this case. See *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299-300 (1943); see, e.g., *United States Brewers Ass'n v. Perez*, 592 F.2d 1212, 1215 (1st Cir. 1979). If comity no longer bars cases like this one, it can only be because *Hibbs* contracted the doctrine outlined in *Great Lakes*. See, e.g., *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 18 (1st Cir. 2009) (holding that "*U.S. Brewers* is no longer good law" after *Hibbs*). Respondents try to escape this implication, yet they maintain that the same test now applies under both comity and the TIA, and they identify no suit that comity principles would bar but the TIA would not.

Hibbs did not effect such a sea change. The Court simply confirmed that an outsider to a state tax credit can challenge the law in federal court, so long as the suit would neither diminish state revenue nor require interpretation of disputed state-law provisions. The Court left untouched the long line of comity decisions precluding federal-court review of intrusive requests to enjoin state tax laws.

Nor did *Hibbs* disturb the settled rule that the TIA "prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional." *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982). Thus, regardless of comity principles, the TIA forecloses this case.

A. Principles of comity preclude federal-court review of Respondents' suit.

1. The court below viewed comity as lacking independent vitality after *Hibbs*.

Respondents' view of the comity doctrine begins with the premise that the Sixth Circuit did not trim back the doctrine, Resp. Br. 22-23, because the court acknowledged that comity principles "sweep somewhat more broadly than the Act," Pet. App. 18a. But the court's lip service cannot be squared with the rest of its opinion.

As the State stressed in its petition for this Court's review, see Pet. for Cert. 10-21, the Sixth Circuit focused on a division among the lower courts over the scope of the comity doctrine following *Hibbs*. The court explained that the Fourth Circuit occupied one side of the split in holding that *Hibbs* did not affect comity's broader sweep. Pet. App. 10a (citing *DirecTV, Inc. v. Tolson*, 513 F.3d 119, 127-28 (4th Cir. 2008)). The Sixth Circuit expressly rejected the Fourth Circuit's view and instead agreed with the approach taken by the Seventh and Ninth Circuits. Pet. App. 10a-11a (citing *Levy v. Pappas*, 510 F.3d 755, 762 (7th Cir. 2007); *Wilbur v. Locke*, 423 F.3d 1101, 1110 (9th Cir. 2005)). Those circuits adopt a unitary rule under which comity applies if and only if the TIA also applies, and no daylight exists between the two standards. *Levy*, 510 F.3d at 762.

The First Circuit's post-*Hibbs* approach erases any doubt that the majority of lower courts to have considered the question now view comity as extending no farther than the TIA. Before *Hibbs*, the

First Circuit held that comity principles bar suits, like this one, against state tax exemptions, even though such suits do not reduce state tax revenue. See *U.S. Brewers*, 592 F.2d at 1215. But when a virtually identical case came to the court after *Hibbs*, the First Circuit changed course. See *Coors Brewing*, 562 F.3d at 5. The court acknowledged that, "[i]f not for *Hibbs*, *U.S. Brewers* would control the resolution of this action," *id.* at 16, but it agreed with the Sixth Circuit's "narrowed view of comity principles in light of *Hibbs*," *id.*; overruled *U.S. Brewers*, *id.* at 18; and held that, because "an injunction eliminating an exemption . . . does not seek to arrest state tax collection, comity is no bar," *id.* Respondents cannot have it both ways—relying repeatedly on the First Circuit's *Coors Brewing* decision, see Resp. Br. 23, 32, 37, 41, even as they insist that the Sixth Circuit did not restrict or eliminate the comity doctrine, see Resp. Br. 22-23.

2. Respondents' approach likewise eviscerates the comity doctrine.

No less than the Sixth Circuit, Respondents pay lip service to comity principles, but they identify no case that the comity rule would bar but the TIA would not. Respondents' approach neuters both the comity rule itself and the federalism principles that underlie the doctrine.

Respondents advocate a single standard to govern the preclusion of suits under both the TIA and the comity doctrine. They argue that the TIA "bars lawsuits seeking to impede the collection of a tax, but does not bar lawsuits, like this one, seeking to invalidate tax credits granted to other taxpayers." Resp. Br. 11. Or, put another way, the TIA forestalls

"relief which would 'arrest or counter-mand' state tax collection." *Id.* at 21-22 n.5 (no citation). Their version of the comity test is identical: Comity precludes only suits seeking relief that would "arrest or countermand state tax collection.'" *Id.* at 11; accord *id.* at 27. Respondents' unitary rule leaves no room for comity to bar a suit that otherwise could proceed under the TIA—even though this Court has repeatedly explained that the TIA is not "coterminous with pre-1937 federal equity treatment of challenges to state taxes." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 524-25 (1981); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 101 (1981); *Nat'l Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582, 584-85 (1995) ("*NPTC*"); *Great Lakes*, 319 U.S. at 301.

In the face of these precedents, Respondents acknowledge that "the comity doctrine can block a lawsuit even when the TIA does not," and they offer two examples. Resp. Br. 23. Under Respondents' formulation, however, the TIA itself would bar both actions, and comity therefore plays no role. First, Respondents cite *Fair Assessment* for the proposition that "comity bars a damages action seeking essentially to countermand a tax collection, whether or not the TIA bars such a suit." Resp. Br. 23. If Respondents are right that *Fair Assessment* involved a "damages action seeking essentially to countermand a tax collection," then the TIA would preclude such a suit, since—in Respondents' view—the TIA forecloses "relief which would 'arrest or counter-mand' state tax collection." *Id.* at 21-22 n.5.

Second, Respondents assert that comity principles would bar "a suit seeking declaratory

judgment that a tax collection is impermissible, even though the TIA says nothing about declaratory judgment actions." *Id.* at 23 (citing *Great Lakes*, 319 U.S. 293). But the TIA *does* say something about declaratory judgment actions: It "prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional." *Grace Brethren*, 457 U.S. at 408. Respondents therefore posit no case in which comity principles apply but the TIA does not.

Even if Respondents' position affords greater breadth to comity than to the TIA, however, Respondents fail to explain why comity includes *Great Lakes* and *Fair Assessment* but excludes this case. The distinction cannot be the relief sought in the complaint, see Resp. Br. 11, because the plaintiffs in *Great Lakes* asked for the same relief as Respondents: a declaration that a state tax scheme was unconstitutional, but no injunction against any of their own taxes. 319 U.S. at 294. Nor can the distinction be the "disruptive effect" of the requested relief in *Fair Assessment*, 454 U.S. at 111, and *Great Lakes*, 319 U.S. at 299, because the practical effects here are equally intrusive. See Pet. Br. 27-33 and Part A.5 below.

Respondents' underlying error is in assuming that the comity rule serves only to protect state coffers. Resp. Br. 24. Their amicus repeats that mistake even more expressly, asserting that the TIA was "[d]esigned to produce precisely the same result as the doctrine of comity," COST Br. 8—to shield "the stream of state tax dollars," *id.* at 3. Respondents and COST accurately describe the "state-revenue-protective" purpose ***of the TIA***,

Hibbs, 542 U.S. at 106, but comity's goals are larger. "Given the strong background presumption against interference with state taxation, the Tax Injunction Act may be best understood as but *a partial codification of* the federal reluctance to interfere with state taxation." *NPTC*, 515 U.S. at 590 (emphasis added).

Comity principles vindicate several interests beyond the influx of state revenue. First, the doctrine strikes an appropriate federalism balance by respecting States' sovereign authority over their own tax policies. See *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932); *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). Second, because any "determination of the unconstitutionality of a state tax scheme . . . would halt its operation," comity avoids interference in state tax regimes even in cases where federal court-ordered relief would not interrupt the stream of tax income. *Fair Assessment*, 454 U.S. at 115. Third, comity fosters "the informed evolution of state policy by state tribunals," *Moore v. Sims*, 442 U.S. 415, 430 (1979), and furthers the States' interest in having their own courts review constitutional challenges to state tax laws, *Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 826 (1997).

For all of these reasons, comity's application is not limited to "suits that would disrupt the inflow of state revenue." COST Br. 2; accord Resp. Br. 24. This Court's decision in *NPTC* perhaps best illustrates the point. The plaintiffs there filed a § 1983 action in the Oklahoma courts alleging that Oklahoma's tax structure discriminated against out-of-state trucks. 515 U.S. at 584. The Oklahoma Supreme Court found that the taxes offended the

dormant Commerce Clause, but it held that the plaintiffs were not entitled to relief under § 1983 because none would have been available in federal court. *Id.* at 585. In affirming, this Court held "that § 1983 does not call for either federal or state courts to award injunctive and declaratory relief in state tax cases when an adequate legal remedy exists." *Id.* at 589. To be sure, the *NPTC* plaintiffs requested "refunds of taxes paid," *id.* at 584, but that fact was conspicuously irrelevant to the Court's reasoning. Rather, the Court repeatedly emphasized "principles of comity and federalism" and "the longstanding federal reluctance to interfere with state taxation." *Id.* at 586, 587, 589, 590, 591. Nowhere did the Court intimate that these principles would not have applied if the plaintiffs had instead sought to increase the taxes on in-state trucks.

Ample circuit case law further confirms that comity is not limited to suits that threaten the state revenue stream. The plaintiffs in *In re Gillis*, 836 F.2d 1001, 1004 (6th Cir. 1988), for example, argued that their suit would "enhance the collection of taxes" because they challenged the under-assessment of other properties, not their own tax liabilities. Nonetheless, the Sixth Circuit found that comity principles foreclosed the suit because its "very maintenance . . . unduly intrude[d] on administration of the State's tax system." *Id.* at 1009. The plaintiffs in *DirecTV* likewise objected to the tax rate of *other* entities, 513 F.3d at 124-25, yet the Fourth Circuit explained that the relief the plaintiffs sought—an order reinstating a tax on cable providers that North Carolina had abandoned—was "just th[e] sort of heavy-handed federal court interference in state taxation that the principle of

comity is intended to avoid." *Id.* at 125. And the large beer producers in *U.S. Brewers* sued not to reduce their own tax liability, but to invalidate an exemption for smaller producers. 592 F.2d at 1214. The First Circuit rejected the request on comity grounds, holding that "an order of a federal court requiring [Puerto Rico] officials to collect taxes which its legislature has not seen fit to impose on its citizens strikes us as a particularly inappropriate involvement in a state's management of its fiscal operations." *Id.* at 1215.

If Respondents' approach is correct, then all of these cases were wrongly decided. But this Court in *Hibbs* discussed two of them—*Gillis* and *U.S. Brewers*—with no hint of disapproval. 542 U.S. at 109 n.11. The United States and Arizona had relied on those cases, among others, for the proposition that the TIA precludes suits that "might augment collections." *Id.* The Court explained that neither case supported such a reading of the statute—*Gillis* because it was "a third-party action" that did not depend on the TIA, and *U.S. Brewers* because it rested on comity grounds. *Id.* If the Court meant to cast doubt on those holdings, it would have said so, just as it did earlier in the same footnote when it disapproved of *ACLU Foundation v. Bridges*, 334 F.3d 416 (5th Cir. 2003).

The case law establishes, then, that the comity and TIA standards are not identical; that comity principles reach more broadly than the TIA; that shrinking the comity bar to the scope of the TIA would leave federalism interests unprotected; and that comity principles foreclose state tax challenges even if the suit would increase state revenue.

3. *Hibbs* does not affect the comity analysis.

Because Respondents purport to derive their comity rule from *Hibbs*, they seem to suggest that if comity stands diminished, it is *Hibbs*'s doing. Resp. Br. 27. They read *Hibbs* as holding that "comity principles preclude jurisdiction only where, as in *Fair Assessment* and *Great Lakes*, the 'plaintiffs have sought district-court aid in order to arrest or countermand state tax collection.'" *Id.* (quoting *Hibbs*, 542 U.S. at 107 n.9). But Respondents misinterpret *Hibbs* on comity.

All parties agree that *Hibbs* held that comity principles did not bar the suit before it, 542 U.S. at 107 n.9; the disagreement is over *why* the Court so held. Respondents maintain that the Court fully stated its reason in footnote 9: the suit did not seek "district-court aid in order to arrest or countermand state tax collection." *Id.* If Respondents' reading is correct, then the *Hibbs* Court announced a comity rule that mimics the TIA standard—and thereby rendered comity a nullity for all the reasons explained above. But it is doubtful that the Court would have forsaken its longstanding and oft-repeated holding that comity principles apply more broadly than the TIA, see, e.g., *Fair Assessment*, 454 U.S. at 101, without explanation, see *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986).

Instead, the *Hibbs* Court's own words show its fidelity to earlier comity decisions. The Court did not say—as Respondents would have it—that the suits in *Great Lakes* and *Fair Assessment* were barred because the complaints in those cases, *on their face*, requested relief that would "arrest or countermand

tax collections." Resp. Br. 30. That characterization would have been inaccurate, because the plaintiffs in *Great Lakes* sought only a declaratory judgment, with no injunctive request. *Great Lakes*, 319 U.S. at 295. But because such a declaration "may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *id.* at 299, the Court characterized the requested declaratory relief as seeking "'a judgment against a state officer *to prevent enforcement* of a state statute." *Id.* at 296 (emphasis added). Similarly, the *Fair Assessment* Court focused "not on the specific form of the relief requested," but rather on whether the suit, "'in every practical sense,'" would *lead* to an obstruction of state tax collection. 454 U.S. at 111 (quoting *Great Lakes*, 319 U.S. at 299). Notably, the Court did not rely on the theory that damages amount to a de facto tax refund that countermands the initial collection, for it noted the plaintiffs' argument that the damages sought would be "recover[ed] from individual state officers, not from state coffers." *Id.* at 113. But that fact did not alleviate the larger problem—that the *declaration* that must precede such damages "would be fully as intrusive as the equitable actions that are barred by principles of comity." *Id.*

The critical point in *Great Lakes* and *Fair Assessment*, then, was that the requested relief would have threatened the continued application of state tax law *as a practical matter*, regardless of the plaintiffs' narrow prayers. And *Hibbs*'s footnoted description of those cases as seeking relief that would "arrest or countermand state tax collection" must be understood in the same sense—in terms of the practical effects threatened by a declaration.

Hibbs's footnote 9 also must be read in the context of the full opinion, which underscored three factors that made the case exceptional: (1) because plaintiffs were asking to invalidate a tax credit, their suit would increase, not decrease, state tax revenue, 542 U.S. at 93; (2) the plaintiffs were "third parties" who did not contest their own tax liability, *id.*; and (3) the suit did not call on the federal court to interpret any state law because it was an Establishment Clause challenge, *id.* at 106 n.8. Given this unusual combination of factors, the Court simply held in footnote 9 that the case could proceed in federal court without offending principles of comity.

Respondents' suit is not similarly unique. Even assuming that this action, if successful, would not diminish Ohio's tax revenue—an assumption that the State disputes, see Pet. Br. 37-38—Respondents are not third parties to the tax at issue. Respondents assume that third parties are those who are "not seeking to block a tax that they were obliged to pay." Resp. Br. 16. But as the State explained, Pet. Br. 35-36, the *Hibbs* Court deemed the plaintiffs before it "third parties" because they were outsiders to the tax at issue; they did not claim that anything about their own tax liability was unconstitutional. 542 U.S. at 93, 108. By contrast, the very premise of Respondents' suit is that Ohio taxes them differently from local distribution companies ("LDCs"). Thus, unlike the *Hibbs* plaintiffs, Respondents *do* object to their own tax treatment; they just manage to contort their remedy request to avoid seeking a lower tax bill.

Hibbs also repeatedly emphasized the subject matter of the suit before it and explained that the Court had adjudicated many tax-credit challenges on Establishment Clause and race-discrimination grounds. 542 U.S. at 93-94, 110-12. Respondents assert that the State, in also stressing this factor, is attempting to limit *Hibbs* "only to certain constitutional challenges" and to disfavor plaintiffs whose "motive" is to "advance a business interest." Resp. Br. 14-15. But *Hibbs*'s emphasis on subject matter is important for two reasons.

First, a plaintiff who attacks a tax credit on Establishment Clause grounds is a true third party—a complete outsider to the tax who has standing only by virtue of "a narrow exception to the general constitutional prohibition against taxpayer standing." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 602 (2007) (citing *Flast v. Cohen*, 392 U.S. 83 (1968)); see also *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1008 (9th Cir. 2009) (upholding *Hibbs* plaintiffs' *Flast* standing). Under no other constitutional provision will a plaintiff who is a true outsider to the tax at issue (unlike Respondents here) have Article III standing. And for good reason: "[A]ffording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as virtually continuing monitors of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (internal quotation marks and citations omitted).

Second, *Hibbs* also underscored the case's subject matter because the question was only whether the law, as applied, violated the Establishment Clause; the plaintiffs "ha[d] not asked the District Court to interpret any state law," and therefore the parties had "no disagreement as to the meaning of" Arizona law. 542 U.S. at 106 n.8. *Fair Assessment* similarly left open the question "whether the comity spoken of would also bar a claim under § 1983 which requires no scrutiny whatever of state tax assessment practices, such as a facial attack on tax laws colorably claimed to be discriminatory as to race." 454 U.S. at 107 n.4. Thus, the many race-discrimination and Establishment Clause cases cited in *Hibbs* were consistent with the TIA and comity principles in part because they did not intrude into the meaning or administration of state law. 542 U.S. at 110 (citing, e.g., *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)). And in the race context, "resistance at the state and county level, by legislation, and by lawsuits," to *Brown* often left African-American plaintiffs with no other adequate remedy at law, making federal-court intervention "imperative[]." *Griffin v. County Sch. Bd.*, 377 U.S. 218, 229 (1964) ("There has been entirely too much deliberation and not enough speed . . . ." (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)), *cited in Hibbs*, 542 U.S. at 93.

Hibbs therefore did not scale back comity principles, nor did it (or the State of Ohio here) create a "hierarchy of constitutional rights" for purposes of comity or the TIA. Resp. Br. 17. The Court merely recognized that the suit before it, with all its limiting characteristics, would not intrude into state tax administration in a way that either the TIA

or comity principles forbid. Any lawsuit that *would* so intrude, however, remains barred, regardless of the underlying constitutional claim. See, e.g., *Advertiser Co. v. Wallace*, 446 F. Supp. 677, 679-80 (M.D. Ala. 1978) (barring First Amendment challenge to allegedly punitive taxes imposed on newspaper publisher), *cited with approval in Fair Assessment*, 454 U.S. at 113 n.7.

4. Comity principles bar federal suits that would unduly intrude in state tax administration.

This Court has explained the standard to apply in evaluating whether comity principles foreclose a federal suit on comity grounds: "[T]axpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal court." *Fair Assessment*, 454 U.S. at 116. "The focus [is] not on the specific form of relief requested," but on the suit's "disruptive effect." *Id.* at 111 (citing *Great Lakes*, 319 U.S. at 299). Thus, even where § 1983 is not the vehicle, comity principles foreclose "intrusive" actions that would result, "[i]n effect," in a declaration that a state tax system is unconstitutional. *Id.* at 113.

Respondents object that this "multi-factor test" creates "a veritable jurisdictional morass," and they prefer "a categorical rule that federal courts have jurisdiction over constitutional challenges to tax exemptions and credits." Resp. Br. 36-37. Respondents argue that this categorical rule should be "judged . . . solely from the face of the [c]omplaint." *Id.* at 11. But neither Respondents' objections nor their proposed test withstand analysis.

To begin with, the intrusiveness inquiry is neither muddled nor difficult to apply. The courts of appeals have shown a ready ability to discern which cases run afoul of comity principles—those that intrude into state tax law or disrupt its administration. Federal courts should decline, for instance, to declare unconstitutional the repeal of a previous tax (thereby effectively mandating its reinstatement), see *DirecTV*, 513 F.3d at 125; to hold that virtually all taxpayers in a State were deprived of equal protection by the State's administration of its tax system, *Gillis*, 836 F.2d at 1008; or to require state officials to collect taxes that their legislature had not seen fit to impose on its citizens, *U.S. Brewers*, 592 F.2d at 1215. Aside from the circuits that interpret *Hibbs* as limiting comity principles, Resp. Br. 37 (citing *Coors*, 562 F.3d at 18; *Levy*, 510 F.3d at 762; *Wilbur*, 423 F.3d at 1110), Respondents do not cite a single case showing that the lower courts have struggled to apply the comity rule.

In any event, to the extent Respondents complain that the intrusiveness inquiry is imprecise, their objection goes to the very nature of comity as "a guiding rule in equity." *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 281 (1909). The comity doctrine is "not a denial of the jurisdiction which Congress has conferred on the federal courts," but rather "a recognition that . . . a federal court of equity" sometimes should "stay its hand in the public interest." *Great Lakes*, 319 U.S. at 297. And in balancing "public consequences" with private rights, "[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies," *Railroad Comm'n v. Pullman*, 312 U.S. 496, 500

(1941)—particularly where those policies lie at the core of state governments' "fiscal operations," *Matthews*, 284 U.S. at 525. Any application of comity principles, then, necessarily will involve a variety of equitable considerations, with a heavy presumption of noninterference in state tax policy. See *Boise Artesian*, 213 U.S. at 282-83.

Even if a categorical approach were appropriate in this equitable context, Respondents' is unworkable. Respondents believe that comity principles never bar an action that, judged solely by the face of the complaint, "does not seek to arrest or impede the collection of state taxes." Resp. Br. 24. But that rule leaves comity's application entirely at the whim of how plaintiffs frame their complaint. The Court frequently looks beyond the face of the complaint to determine whether a case properly belongs in federal court. See, e.g., *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 315 (2005 (substantial federal question); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003) (complete preemption); *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983) (well-pleaded complaint rule). And as the amicus brief of forty-five States demonstrates, Respondents' highly manipulable rule would open the federal courts to a range of artfully pleaded state tax challenges. Br. of Illinois et al. 17-22.

More fundamentally, Respondents' proposed rule misses the point of comity. To achieve parity in an equal protection or dormant Commerce Clause case, the plaintiff taxpayer will have two options in framing its plea for relief: either decrease its own tax liability or increase its competitor's. As between

the two taxpaying entities, comity does not care whose ox is gored. But it very much cares about the "disruptive effect" the suit will have *on the State*. *Fair Assessment*, 454 U.S. at 111. And whether the plaintiff taxpayer pays less or its competitor pays more, it is the State's tax law that will be invalidated, and the State's legislature and taxing authorities that will have to fix the problem.

5. The intrusiveness of this suit triggers the application of comity principles.

Respondents' own arguments demonstrate that this case triggers the application of comity principles because it intrudes into the meaning and operation of Ohio's tax code. They assert that their requested relief "is simple and easy to implement: It is a declaration that the exemptions at issue violate the U.S. Constitution and an injunction against enforcement of the exemptions." Resp. Br. 40. "[O]nce that relief is granted," Respondents maintain, "it will be up to the Ohio General Assembly to . . . determine how best to recast the tax laws." *Id.* at 40-41. Respondents' view, in other words, is that it is not disruptive for a federal court to declare a state tax law unconstitutional, enjoin its enforcement, and then leave it for the state authorities to deal with the consequences. But exactly that scenario lies at the heart of comity.

Respondents make no bones about the fact that they are asking the federal court to enjoin the State "from recognizing and/or enforcing" the exemptions at issue. J.A. 20-21 (Compl., prayer for relief); accord Resp. Br. 40. This Court has squarely explained that such relief—"eliminating the

exemption"—"could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 818 (1989). Just as in *Davis*, 489 U.S. at 818, the "permissibility" of this approach—simply collecting more taxes from LDCs—"depends in part on" Ohio law, including whether Ohio law permits duplicate taxation of gross receipts. See *Ohio Grocers Ass'n v. Levin*, 916 N.E.2d 446, 451 (Ohio 2009) (citing *S. Gum Co. v. Laylin*, 64 N.E. 564, 566 (Ohio 1902), in discussing the permissibility of double excise taxation).

Respondents brush *Davis* aside by noting that *Hibbs* endorsed "merely enjoining an exemption," Resp. Br. 41, but they ignore the basic differences between the credit at issue in *Hibbs* and the challenged exemptions here. The credit in *Hibbs* was a tax benefit that advanced Arizona's policy objectives related to private schools. 542 U.S. at 94-95. When taxpayers donated money to a qualified "school tuition organization," they could credit up to $500 of their donation (or $625 for joint-return filers) against their state tax liability. *Id.* at 95.

The exemptions at issue here, by contrast, are not in the nature of tax benefits; instead, they are structural exemptions that recognize that LDCs, as public utilities, are subject to an entirely different set of taxes from other businesses. See Ohio Rev. Code §§ 5727.06 (public utilities personal property tax), 5727.24 (public utilities gross receipts tax), 5727.811 ("MCF" tax). Thus, while it is accurate to say that LDCs are "exempt" from the franchise and sales taxes that other businesses pay, that is because they are subject to the separate tax regime for public

utilities. By analogy, it is *accurate* to say that real property is "exempt" from the personal property tax, but that is because real and personal property are separately classified and therefore subject to different taxes.

The provisions to which Respondents object are fundamental to Ohio's tax code in other respects. Respondents complain, among other things, that independent marketers ("IMs") pay Ohio's commercial activities tax, or CAT, but LDCs do not. J.A. 15-16 (Compl. ¶¶ 49-53). The CAT was "one of the key components of a series of tax revisions" implemented in 2005 "to lessen the burden of taxation on Ohio's businesses." *Ohio Grocers Ass'n*, 916 N.E.2d at 449 (internal quotation marks omitted). "For many businesses, the CAT replace[d] the tax on personal property located and used in business in Ohio, and it replace[d] the tax on the privilege of exercising the corporate franchise in th[e] state." *Id.* (citations omitted).

Respondents' specific objection to this signature element of Ohio's recent tax-reform legislation demonstrates the degree to which the parties dispute the meaning and operation of Ohio tax law. Respondents allege that Ohio's tax treatment is unconstitutional in part because IMs must pay the CAT but LDCs do not. Resp. Br. 4. As the State has explained, however, LDCs pay an analogous tax—the gross receipts tax ("GRT"). Pet. Br. 28. Both the CAT and the GRT are franchise taxes imposed on the privilege of doing business, measured by the business's gross receipts. See *Ohio Grocers Ass'n*, 916 N.E.2d at 450-51. Respondents propose a different comparison, suggesting that the

GRT imposed on LDCs should be likened to the sales tax imposed on IMs. J.A. 13-15 (Compl. ¶¶ 40-48). But that comparison is inapt because the GRT is a franchise tax, not a sales tax. See *Ohio Grocers Ass'n*, 916 N.E.2d at 450-51 (explaining that a franchise tax is a tax on the privilege of doing business and may be measured by gross receipts).

Further disagreements over Ohio law belie Respondents' assertion that this "case will not require the district court to interpret any state law." Resp. Br. 29. Respondents argue that a personal property tax imposed on LDCs but not IMs has "no relevance" because it is "unrelated to commodity sales." Resp. Br. 5 n.2. But again, that is because the CAT phased out the personal property tax for most businesses, including IMs, but not public utilities like LDCs. See *Ohio Grocers Ass'n*, 916 N.E.2d at 449. Instead, the LDCs still pay the personal property tax and another tax, the MCF tax, unique to them. Pet. Br. 6.[1]

If the parties cannot agree on the meaning of Ohio's tax code—despite the Ohio Supreme Court's recent guidance—then the federal court will have to do more than simply "*read* the state statute," as Respondents assert. Resp. Br. 30. It will need to resolve these disagreements over the interpretation of Ohio law. This Court has discouraged federal courts from entertaining constitutional challenges in

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[1] Respondents correctly observe that some, but not all, LDCs have applied to leave the natural gas market. Resp. Br. 3 & n.1. Once those applications become final, the exiting LDCs will retain residual duties to some natural gas customers. The pending applications therefore do not moot this case (nor do Respondents suggest that they do).

which they will "be forced to interpret state law without the benefit of state-court consideration," *Moore*, 442 U.S. at 428, particularly "respecting questions of state taxation," *Farm Credit Servs.*, 520 U.S. at 826.

Finally, even if the federal court declares the exemptions unconstitutional and enjoins them, the court will have tied the State's hands. Ordinarily "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination," including by affording a refund to the plaintiff taxpayer. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-40 (1990). By disclaiming that relief in order to obtain federal-court review, Respondents have deprived the State of the choice it otherwise would have in responding to a finding of unconstitutionality. See *id.* at 40-41 & n.23.

B. Even if comity principles do not bar this action, the TIA does.

In addition to comity principles, the TIA forecloses this case. The statute "prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional." *Grace Brethren*, 457 U.S. at 408. Because Respondents seek precisely that relief, see J.A. 20, their suit is barred.

Hibbs had no effect on *Grace Brethren*'s holding. *Hibbs* simply determined that the TIA did not preclude a third-party Establishment Clause challenge that required no interpretation of disputed state-law provisions and would increase, not decrease, state tax revenue. The State explained at length in its opening brief, Pet. Br. 19-23, 33-39, and

in Part A.3 above that the factors that made the suit in *Hibbs* exceptional are not present in this case. That explanation applies equally in the TIA and comity contexts.

Tax exemptions are often a central component of a State's tax laws, affecting millions of taxpayers. The States have a paramount interest in having the constitutionality of such core tax policy decisions adjudicated in their own courts. See *Farm Credit Servs.*, 520 U.S. at 826. Respondents offer no reason why the Ohio courts are not an adequate forum for this suit. To the extent Respondents' objection may rest on "a general distrust of the capacity of the state courts to render correct decisions on constitutional issues," this Court has "emphatic[ally] reaffirm[ed]" both "the constitutional obligation of the state courts to uphold federal law" and its "confidence in their ability to do so." *Allen v. McCurry*, 449 U.S. 90, 105 (1980) (citing *Stone v. Powell*, 428 U.S. 465, 493-94 & n.35 (1976)).

This Court should reverse the Sixth Circuit's decision and allow the Ohio courts to adjudicate the constitutionality of their own State's tax laws.

CONCLUSION

For the above reasons and those stated in Petitioner's opening brief, the Court should reverse the Sixth Circuit's judgment.

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February 26, 2010

SUPPLEMENTAL BRIEF

No. 09-223

In The
Supreme Court of the United States

RICHARD A. LEVIN, Tax Commissioner of Ohio,
Petitioner,

v.

COMMERCE ENERGY, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENTS

INTRODUCTION

Pursuant to Supreme Court Rule 25.5, Respondents submit this supplemental brief to highlight the intervening opinion in *Hertz Corp. v. Friend et al.*, Case No. 08-1107, 559 U.S. ___ (2010), Slip Opinion issued on February 23, 2010.[1] In *Hertz*, this Court unanimously held that a clear jurisdictional test should be adopted for purposes of the federal diversity jurisdiction statute, 28 U.S.C. § 1332(c)(1). Slip Op. at 14. One of the key rationales underlying *Hertz* is that jurisdictional rules should be clear because they foster administrative simplicity and predictability. *Id.* at 15-16. For the same reasons, this Court should likewise reject the Petitioner's multi-factored and vague "unwarranted intrusion" test to determine when comity bars a constitutional challenge in federal district court to state tax exemptions. See Brief of Respondents at Argument § II.C.2. Rather, this Court should continue to recognize the clear jurisdictional test set forth in *Hibbs v. Winn*, 542 U.S. 88, 107 n.9 (2004), that comity precludes federal-court jurisdiction only when plaintiffs seek an order "to arrest or countermand state tax collection."

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[1] The Brief of Respondents was filed on January 29, 2010.

ARGUMENT

Like in *Hertz*, the twin virtues of administrative simplicity and predictability warrant rejection of the multi-factored comity test espoused by the Commissioner.

In *Hertz*, this Court unanimously held that the phrase "principal place of business" in the federal diversity jurisdiction statute, 28 U.S.C. § 1332(c)(1), "is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities." Slip Op. at 14. This test is typically referred to as the "nerve center" test, and in practice should normally be the place where the corporation maintains its headquarters. *Id.* This Court reasoned that the "never center" test was not only consistent with the language and legislative history of the statute, but also fostered the twin "virtues" of administrative simplicity and predictability preferred in jurisdictional rules. *Id.* at 15 (citing *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment)).

"Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id.* at 15 (citing *Navarro Savings Assn. v. Lee*, 446 U.S. 458, 464, n. 13 (1980)). Complex tests add expense to the litigation, encourage gamesmanship, and reduce the chance that the results of litigation accurately reflect the legal and factual merits of the claims. *Id.* Complex tests also waste judicial resources. Accordingly, "courts benefit from straightforward rules under which they can readily

assure themselves of their power to hear a case." *Id.* (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)).

"Simple jurisdictional rules also promote greater predictability." Slip Op. at 16. Corporations making business and investment decisions value predictability. *Id.* Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court. *Id.*

The twin virtues of administrative simplicity and predictability are just as important when a district court is asked to determine at the pleading stage whether comity bars a case from proceeding in federal district court. As already explained in the Brief of Respondents, Argument § II.C.2, a categorical rule that federal courts have jurisdiction over constitutional challenges to tax exemptions is far more predictable and amendable to judicial administration than the Commissioner's multi-factored "intrusion" analysis. Thus, like in *Hertz*, this Court should reaffirm the holding in *Hibbs*, 542 U.S. at 107 n.9, that comity bars federal district court jurisdiction only when the plaintiffs seek to impede state tax collection.

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AMICUS CURIAE BRIEF

No. 09-223

IN THE

Supreme Court of the United States

RICHARD A. LEVIN, Tax Commissioner of Ohio,

Petitioner,

v.

COMMERCE ENERGY, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTEREST OF THE *AMICUS CURIAE*[1]

COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional businesses. COST represents nearly 600 of the largest multistate businesses in the United States. Its members include businesses from every state and every industry. As *amicus*, COST has participated in many of the significant tax cases to come before this Court in recent years, including *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277 (2009), *MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16 (2008), and *CSX Transportation, Inc. v. Georgia State Board of Equalization*, 552 U.S. 9 (2007).

COST's membership has a vital interest in ensuring that states do not impede, through discriminatory taxes, the rights of all businesses to engage in commerce in the national market. COST's membership has an equally vital interest in ensuring that federal courts remain available to resolve constitutional challenges to state taxing schemes where the flow of tax revenue to the state will not be impeded. That is the historical role of the doctrine of comity, one that is respectful of state authority while

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[1] In accordance with Supreme Court Rule 37, counsel of record for both parties have received timely notice of *amicus curiae*'s intention to file a brief in support of Respondents, and letters of consent to the filing of this brief are being submitted to the Court with this brief. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities (other than the *amicus* itself or its counsel) made a monetary contribution to the preparation or submission of this brief.

at the same time protecting out-of-state corporations from parochial favoritism.

SUMMARY OF THE ARGUMENT

Ohio grants certain tax credits to in-state natural gas companies. Respondents (two out-of-state natural gas suppliers and a customer of one of these suppliers) sought to enjoin these tax credits as violative of the Equal Protection and Commerce Clauses of the United States Constitution. Respondents brought their suit in federal—as opposed to state—court. In response, the State of Ohio claimed that both the doctrine of comity and the Tax Injunction Act, 28 U.S.C. § 1341, have precluded certain state tax disputes from proceeding in federal court. At issue in this case is whether either bars Respondents' suit.

The first question presented—whether *Hibbs v. Winn*, 542 U.S. 88 (2004), narrowed or eliminated the doctrine of comity—assumes that comity at one time reached farther than described in *Hibbs*. Not so. In an unbroken line of state tax cases stretching back to 1870, this Court has invoked comity only when a federal suit threatens the state revenue stream. Thus, although sometimes spoken of in broad terms, comity always has played a limited, albeit important, role in state tax disputes: precluding federal courts from adjudicating suits that would disrupt the inflow of state tax revenue.

This historical scope is the proper one, as it respects the operations of state government while permitting access to a federal forum for cases that do not threaten the state fisc. Adhering to this understanding provides a clear definition of comity, grounded in precedent and easy to apply. It also

leaves federal courts open to state tax cases that turn on the interpretation of federal law, are based on claims of in-state bias, or both, when these cases would not disrupt the inflow of state tax revenue. In such cases, a federal forum often is appropriate or even essential. And for these cases, other traditional abstention doctrines remain available to address any federalism issues that are beyond comity's historical application to state tax disputes.

ARGUMENT

Comity embodies federal courts' "proper respect for state functions," instructing them to refrain from "unduly interfer[ing] with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). In *Hibbs v. Winn*, 542 U.S. 88 (2004), this Court recognized that where state tax is concerned, it "has relied upon 'principles of comity' to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." *Id.* at 107 n.9 (internal quotation omitted). Far from signaling a departure from a long-standing practice, the Court in *Hibbs* simply echoed the historical operation of the doctrine of comity in the state tax context. In such cases, comity always has required that federal courts avoid disrupting the inflow of state tax revenue.

Nonetheless, Petitioner claims that the doctrine of comity "applies regardless of whether the requested relief is declaratory, injunctive, or compensatory in nature." Pet'r Br. at 19. But effects, not labels, are comity's affair. If the relief sought will disrupt the stream of state tax dollars, then—and only then—does comity direct a federal court to refrain from exercising its congressionally mandated authority.

There is no reason for expanding the principle beyond this traditional scope, nor basis for eliminating comity's historical limitations.

A. IN STATE TAX DISPUTES, COMITY REQUIRES THAT FEDERAL COURTS AVOID DISRUPTING THE INFLOW OF STATE TAX REVENUE

1. This Court initially invoked comity to explain and reinforce its exercise of equitable restraint

Long before Congress passed the Tax Injunction Act (the "Act") in 1937, this Court acknowledged that a steady stream of tax revenue is essential to the operations of both state and federal governments. "No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man, to whom delay was more important than the payment of costs." *Tennessee v. Sneed*, 96 U.S. 69, 75 (1877). Any interruption could disrupt the provision of government services and, ultimately, harm the public. The ability of courts to enjoin tax collection was a primary threat to this revenue stream; an injunction against the collection of taxes could "seriously embarrass all the operations of the government depending on the source of revenue which by means of [an injunction] would be stopped." Thomas M. Cooley, *A Treatise on the Law of Taxation* 536–37 (1876).

As a result, both state and federal governments took steps to prevent courts from disrupting their revenue streams. With respect to federal tax dollars, for example, the federal government enacted legislation prohibiting any court from restraining the

assessment or collection of federal taxes. *See* Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 471, 475. As the Court recognized, this Act "shows the sense of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence." *The State R.R. Tax Cases*, 92 U.S. 575, 613 (1875). With respect to state tax dollars, many States imposed identical restraints on their own courts. *See* S. Rep. No. 1035, at 1 (1937); Maurice S. Culp, *The Powers of a Court of Equity in State Tax Litigation*, 38 Mich. L. Rev. 610, 618–24 (1940) (reviewing state statutes).

But these statutes left one area unaddressed—suits in federal court to restrain the collection of state taxes. Not only did such suits threaten the state fisc but they also created the potential for federal-state tension. The doctrine of comity, well-established outside the state tax context, filled the statutory gap. It demanded that, in all but exceptional circumstances, federal courts refrain from disrupting the inflow of state tax revenue.

Thus, as early as 1870, the Court expressed its aversion to hearing suits that would disrupt the inflow of state tax revenue. In *Dows v. City of Chicago*, 78 U.S. 108 (1870), for example, the Court upheld the lower court's refusal to enjoin the collection of a municipal tax. In so doing, the Court emphasized that it was "upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments." *Id.* at 110. Consequently, "[a]ny delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government,

and thereby cause serious detriment to the public." *Id.* For this reason, the Court stated, federal courts should interfere "as little as possible" with "the modes adopted to enforce the taxes levied." *Id.*

Although the Court in *Dows* looked to the plaintiff's adequate remedy at law, *id.* at 112, the language of the decision was—as this Court subsequently acknowledged, *see, e.g.*, *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 586, 590 (1995)—fully grounded in the principle of comity. Comity both explained and reinforced the Court's refusal to grant equitable relief. *Dows* formed the basis for a long line of cases refusing to enjoin the collection of state taxes.[2] In each of these cases, comity extended only to suits that would disrupt the inflow of state tax revenue. *See, e.g.*, *Matthews*, 284 U.S. at 522–23 (suit to enjoin the collection of state taxes); *Henrietta Mills*, 281 U.S. at 122 (same); *Singer Sewing Mach. Co.*, 229 U.S. at 483 (same). From the earliest days, then, this Court has

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[2] *See, e.g.*, *Matthews v. Rodgers*, 284 U.S. 521, 525 (1932) (noting that the rules of equity practice apply with "peculiar force" to suits "brought to enjoin the collection of a state tax in courts of a different, though paramount, sovereignty"); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U.S. 276, 281 (1909) ("A notable application of the rule [of equitable restraint] in the courts of the United States has been to cases where a demand has been made to enjoin the collection of [state] taxes . . . ."); *Ark. Bldg. & Loan Ass'n v. Madden*, 175 U.S. 269, 273 (1899) ("[O]n principle, the interference of the courts of the United States by injunction with the collection of state taxes . . . can only be justified in a plain case not otherwise remediable."); *see also Henrietta Mills v. Rutherford County*, 281 U.S. 121, 128 (1930); *Singer Sewing Mach. Co. of N.J. v. Benedict*, 229 U.S. 481, 486–88 (1913); *Ind. Mfg. Co. v. Koehne*, 188 U.S. 681, 684 (1903); *Allen v. Pullman's Palace Car Co.*, 139 U.S. 658, 661 (1891); *Shelton v. Platt*, 139 U.S. 591, 600 (1891).

applied comity only to a limited category of state tax cases, those where federal court action would interrupt the flow of state tax revenue.

2. In enacting the Tax Injunction Act, Congress also understood comity to require that federal courts avoid disrupting the inflow of state tax revenue

Despite this Court's decision in *Dows*, some lower federal courts continued to enjoin the collection of state taxes too often. *See England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 431 (1964) (Douglas, J., concurring) (noting that prior to enactment of the Tax Injunction Act, "federal courts, free and easy with injunctions, interfered wholesale . . . with efforts of the States to collect their revenue"). This situation stemmed primarily from the particularities of federal equity practice. For example, federal equity practice required that an adequate legal remedy be available in federal, rather than state, court. *See, e.g., City Bank Farmers' Trust Co. v. Schnader*, 291 U.S. 24, 29 (1934) (allowing a state-tax-injunction suit to proceed in federal court because the state law claim to recover wrongfully assessed taxes could not be brought in federal court). Even when a taxpayer might have had an adequate legal remedy, federal courts still enjoined state tax collection to avoid a multiplicity of suits. *See, e.g., Gramling v. Maxwell*, 52 F.2d 256, 260–01 (W.D.N.C. 1931) (enjoining the collection of a state tax—despite the availability of an adequate legal remedy—to avoid a hundred or more individual suits). And federal courts sometimes enjoined the collection of state taxes after strictly construing equity's requirement that a legal remedy be plain, adequate, and complete, frequently concluding that

state remedies did not suffice under that standard. *See, e.g.*, *Hopkins v. S. Cal. Tel. Co.*, 275 U.S. 393, 399–400 (1928).

Regardless of the cause, federal courts' penchant for enjoining the collection of state tax revenue was too often disrupting the inflow of state tax revenue. *See* S. Rep. No. 1035, at 1–2 (1937). In response, Congress passed the Act of August 21, 1937, Pub. L. No. 75-332, 50 Stat. 738, more commonly known as the Tax Injunction Act. With the Act, Congress created a statutory bar on the ability of federal courts to decide certain state tax disputes. Designed to produce precisely the same result as the doctrine of comity, had it been properly applied, the Act embodied Congress's views on what comity required in the state tax context. Like this Court, Congress understood comity to demand only the minimization of federal interference with the inflow of state tax revenue.

The Act's plain text reveals Congress's concerns. It declares that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State." *Id.* (codified as amended at 28 U.S.C. § 1341). "By its terms, the Act bars *anticipatory relief*, suits to stop ('enjoin, suspend or restrain') the collection of taxes." *Jefferson County v. Acker*, 527 U.S. 423, 433 (1999) (emphasis added). By prohibiting anticipatory relief, Congress directly addressed the form of relief that would directly disrupt the inflow of state tax revenue.

The Act's legislative history tells the same story. The Act's sponsor, Senator Bone, emphasized the threat to state tax revenue in urging passage of the

Act, as did the Senate Judiciary Committee Report. As the Report noted, States regularly forbade the issuance of injunctions against the collection of taxes, which made "it possible for the States and their various agencies to survive while long-drawn-out tax litigation [was] in progress." S. Rep. No. 1035, at 1. But those parties who could invoke federal jurisdiction—often out-of-state corporations—were able to use federal courts to enjoin the collection of state taxes. *Id.* at 1–2; *see also* 81 Cong. Rec. 1416–17 (1937) (statement of Senator Bone). This disparity in the available forum and relief meant that out-of-state taxpayers could "withhold from a State and its governmental subdivisions taxes in such vast amounts and for such long periods as to disrupt State and county finances." 81 Cong. Rec. 1416; *see also* S. Rep. No. 1035, at 1–2. Indeed, as the States grew desperate for much-needed tax funds, these parties were often able to settle their tax bills for a fraction of what they owed. 81 Cong. Rec. 1416; *see also id.* (citing statistics on the millions of dollars in lost tax revenue from only a few suits).

Thus, as this Court has recognized, the Act's history demonstrates that Congress designed it to limit "the jurisdiction of the district courts of the United States *over suits relating to the collection of State taxes*," statutorily imposing precisely what the doctrine of comity—properly invoked—historically had accomplished. S. Rep. No. 1035, at 1 (emphasis added); *see also Hibbs*, 542 U.S. at 104. Nowhere in the legislative history of the Act—much less the Act itself—is there any evidence that comity in the state tax context functioned to do anything more than protect the inflow of state tax revenue. Instead, "[a]s understood and applied by this Court prior to the

passage of the Tax Injunction Act, and by Congress in enacting the Tax Injunction Act, the 'principle of comity' which demanded respect for state tax administration, extended precisely as far as was necessary to ensure that the federal courts not become party to the abuse of their equity power." *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 132 (1981) (Brennan, J., concurring in the judgment). Thus, Congress understood comity, as well as the Tax Injunction Act, as protecting States from federal suits that would disrupt their inflow of tax revenue.

3. This Court's post-Tax Injunction Act cases have continued to treat comity as demanding only the avoidance of suits that would disrupt the inflow of state tax revenue

In post-Act cases, whether concerning the exercise of equitable power, the interpretation of the Act itself, or the interpretation of some other statute, this Court has invoked comity only as a proper reluctance to hear suits that would disrupt the inflow of state tax revenue.

For example, in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943), the Court invoked comity just as it had in pre-Act cases. Faced with a request for a declaratory judgment that would have, in practical effect, halted the state's collection of the taxes at issue, the Court declined to decide whether the Tax Injunction Act would "prohibit a declaration by federal courts concerning the invalidity of a state tax." *Id.* at 299. The Court instead based its decision on the same "considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes." *Id.* That is, the Court relied on comity

to explain and reinforce its exercise of equitable restraint. Thus, *Great Lakes* reflected the same conception of comity as the Court's pre-Act cases. Nearly forty years later, this Court answered the question left open in *Great Lakes*, reading the Act to "prohibit[] a district court from issuing a declaratory judgment holding state tax laws unconstitutional." *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982).

Notwithstanding the co-extensive reach of the Tax Injunction Act and the doctrine of comity in the declaratory judgment setting, comity has an independent role in state tax disputes whenever there is a threat to a state revenue stream. As this Court has acknowledged, comity can reach some cases that the Act might not. *See, e.g., Fair Assessment*, 454 U.S. at 110. Comity provides a guidepost to federal courts, directing them to avoid granting equitable or otherwise discretionary relief if it would disrupt the inflow of state tax revenue, even if the Act would not preclude the relief sought.

Thus, in *Fair Assessment*, this Court examined whether 42 U.S.C. § 1983 authorizes damages for unconstitutional state taxes when state law furnishes an adequate legal remedy. *See* 454 U.S. at 116; *accord Nat'l Private Truck Council*, 515 U.S. at 587. Although the Act does not reach such claims for damages, the Court recognized that these damages suits could "'in every practical sense operate to suspend collection of the state taxes,' a form of federal-court interference previously rejected by this Court on principles of federalism." *Fair Assessment*, 454 U.S. at 115 (quoting *Great Lakes*, 319 U.S. at 299) (ellipsis and citation omitted). As the Court

subsequently underscored, in *Fair Assessment* it had "found no evidence that Congress intended § 1983 to overturn" these principles. *Nat'l Private Truck Council*, 515 U.S. at 590. For that reason, a remedy not precluded by the Tax Injunction Act was guided by a presumption rooted in comity—absent clear evidence to the contrary, Congress would not be presumed to have authorized a suit that would disrupt the inflow of state tax revenue. And this background presumption arose from the same "principles of comity and federalism" that were "invoked in *Dows* and subsequently followed by the courts." *Id.* at 587, 590.

As *Great Lakes*, *Grace Brethren*, and *Fair Assessment* demonstrate, the Court "has relied upon 'principles of comity' to preclude original federal-court jurisdiction *only* when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." *Hibbs*, 542 U.S. at 107 n.9 (citation omitted, emphasis added). To be sure, this Court has sometimes spoken of comity in broad terms. But these statements "are not fairly portrayed cut loose from their secure, state-revenue-protective moorings." *Id.* at 106. Indeed, every case in which the Court spoke of comity in broad terms was also a suit involving plaintiffs seeking to reduce the inflow of state tax revenue. *See id.*; *see also id.* at 105–08.

As the history of state tax disputes in federal court demonstrates, both Congress and this Court have always understood that declining to hear a case on comity grounds is proper only when the case stands to threaten the inflow of state tax revenue. In the state tax context this accords states the appropriate

federal deference and respect. Whatever its impact on particular remedies sought, comity is, and always has been, as *Hibbs* described: a concern over suits that would disrupt the inflow of state tax revenue.

B. COMITY'S TRADITIONAL SCOPE IS STRAIGHTFORWARD IN APPLICATION AND LEAVES FEDERAL COURTS OPEN TO STATE TAX DISPUTES THAT WOULD NOT DISRUPT THE INFLOW OF STATE TAX REVENUE

In the state tax context, comity's traditional scope is firmly grounded in history and precedent, reflecting long-held views on proper federal-state relations. Its traditional reach provides clear and unambiguous guidance for federal courts. In deciding whether a case can proceed, federal courts need only ask a simple question: would this suit disrupt the inflow of state tax revenue? If it would, then comity guides the court's decision. If the plaintiff requests equitable relief, for example, and an adequate legal remedy is available, the court would refrain from granting such relief. Or if a particular damages suit would disrupt state tax collection to the point of imperiling the state's revenue stream, comity would instruct that, absent express congressional authorization, such suits may not proceed in federal court. In every case, then, comity's traditional scope provides a clear, predictable path for courts and litigants.

Deviating from comity's historical reach would sacrifice these virtues. Were comity to be defined by reference to general and broad notions of federalism as Petitioner and his *amici* urge, *see, e.g.*, Pet'r Br. at 12–13, 15–16; States' Br. at 7–9, courts and litigants would be left with little or no guidance as to when a

state tax dispute should proceed in federal court and when it should not. This absence of clarity leaves open the very real and undesirable possibility of inconsistent results as to the availability of federal-court relief in state tax disputes.

Moreover, although federal courts should be reluctant to hear suits that would disrupt the inflow of state tax revenue, there is a "strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). Certain disputes over state taxation may fall within this scope. For example, many state tax disputes turn on the interpretation of federal law. Federal-court adjudication of these cases leads to greater uniformity in interpretation and application.

Access to federal courts also is important for federal constitutional challenges to a state tax, for example, claims that a state tax discriminates against out-of-state businesses. As Justice Story explained in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816), "[t]he constitution has presumed ... that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." This proposition holds even when we "admit[] that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States." *Id.* at 346.

In Commerce Clause challenges to state taxes, apprehension over in-state bias is understandable. States often intend for these provisions to encourage

the growth of, or provide relief to, in-state businesses. And while not necessarily their purpose, these laws can have the unfortunate effect of discriminating against out-of-state business. It is plausible that a state court might be hesitant to find these taxes unconstitutional. Indeed, several decisions from this Court demonstrate that this is sometimes the case. *See, e.g.*, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977) (reversing, on Commerce Clause grounds, state court decision upholding state statute that reduced taxes on stock transfers involving an in-state sale); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984) (reversing, on Commerce Clause grounds, state court decision upholding state statute that exempted certain locally produced liquor from state taxes); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (reversing, on Commerce Clause grounds, state court decision upholding Ohio statute according a tax credit for sales of ethanol produced in a state that provided a similar benefit for ethanol produced in Ohio). Since this Court cannot possibly review every challenge to an allegedly discriminatory tax, the lower federal courts must remain open to these suits if we are to ensure that federal rights are vindicated.

And to the extent a state tax case in federal court implicates other federalism concerns, other comity-based abstention doctrines remain available. *See, e.g.*, *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (court may defer deciding a constitutional challenge to a state law when the state courts might interpret the law in a way that would render the constitutional decision unnecessary); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (federal court can decline to decide a case when the state has special

procedures or forums for addressing that issue). There is thus no basis for extending comity's reach beyond its traditional basis.

CONCLUSION

For over a century, this Court and Congress have understood comity as requiring that federal courts avoid disrupting the inflow of state tax revenue. This is as far as comity has reached. The Court should therefore affirm the judgment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

RICHARD A. LEVIN, Tax Commissioner of Ohio,
PETITIONER,

v.

COMMERCE ENERGY, INC., ET AL.,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did the Court's decision in *Hibbs v. Winn*, 542 U.S. 88 (2004), which addressed the scope of the Tax Injunction Act's bar against federal cases seeking to enjoin the assessment and collection of state taxes, eliminate or narrow the doctrine of comity—applied in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1991)—which more broadly precludes federal jurisdiction over cases that intrude on the administration of state taxation?

2. Do either comity principles or the Tax Injunction Act bar federal jurisdiction over a case in which taxpayers allege, on equal protection and dormant Commerce Clause grounds, that their tax assessments are discriminatory relative to other taxpayers' assessments?

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INTEREST OF THE *AMICI CURIAE*

Acknowledging "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems," *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102 (1981), this Court "has long recognized that principles of federalism and comity generally counsel that [federal] courts should adopt a hands-off approach with respect to state tax administration" and, as a result, that challenges to state taxation must be brought in state court if there is an adequate remedy under state law, *Nat'l Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582, 586-587 (1995). In its decision below, the Sixth Circuit upset this historic federal-state balance in matters of state taxation by making available a federal forum for state tax challenges so long as the challengers frame their complaint as contesting a third party's tax liability rather than their own.

The Sixth Circuit's approach both misunderstands this Court's holding in *Hibbs v. Winn*, 542 U.S. 88 (2004), on the scope of federal jurisdiction under the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, and, worse, misconstrues a footnote in *Hibbs* to undercut the historically grounded, federalism-based concern for comity in state tax matters. If affirmed by this Court, States and their subdivisions will be forced to spend substantial time and money on state tax litigation in the federal courts, even though they offer adequate remedies under their own laws. Because the Sixth Circuit's view subjects state tax administration to unprecedented federal interference, the *amici* States

urge the Court reverse the decision below and confirm the longstanding place of state courts as the principal forum for adjudicating challenges to state taxation.

STATEMENT

1. Respondents, in-state and out-of-state retail natural gas suppliers ("independent marketers" or "IMs") and one of their customers, filed suit alleging that Ohio's laws for taxing natural gas discriminate against interstate commerce and violate equal protection by favoring the IMs' competitors, local natural gas distribution companies ("LDCs"). Pet. App. 4a, 20a. Respondents challenged three exemptions and exclusions Ohio law affords LDCs but not IMs. *Id.* at 4a-5a, 21a. Rather than claim that they, too, were entitled to these exemptions—relief that would have reduced their own state tax burden—respondents sought to eliminate the exemption for their competitors. *Id.* at 7a, 24a.

2. Petitioner moved to dismiss, arguing that the TIA barred respondents' suit in federal court or, in the alternative, that comity required dismissal of respondents' claims. Pet. App. 19a-20a. The district court granted petitioner's motion on comity grounds. *Id.* at 26a-32a.

Before doing so, however, the court rejected petitioner's argument that the TIA barred respondents' federal lawsuit. The TIA directs federal courts not to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State," 28 U.S.C. § 1341, and although the parties agree that Ohio makes available an adequate state court

remedy, Pet. App. 6a n.2, the district court read *Hibbs* to say that the TIA precludes federal jurisdiction only where "state taxpayers seek federal-court orders enabling them to avoid paying taxes," *id.* at 23a (internal quotations omitted). Because respondents framed their complaint so as "not [to] contest[] their own tax liability," and granting their requested relief—enjoining enforcement of the exemptions and exclusions that allegedly favor the LDCs—"would increase state tax revenue," the TIA was inapplicable. *Id.* at 24a. On the latter point, the court dismissed as "speculat[ive]" petitioner's suggestion that, if respondents were to obtain their desired injunction, the LDCs might respond by suing to enjoin the imposition of certain taxes as to themselves, thereby raising the specter of a decrease rather than an increase in state tax revenue. *Id.* at 24a-25a n.1.

Regarding comity, however, the court rejected respondents' argument that *Hibbs* similarly restricted comity's reach "to those cases seeking to stop or countermand state tax collection." Pet. App. 27a. To the contrary, "[t]he scope of federal court deference based on principles of comity is substantially broader than that required under the TIA," extending to suits "seeking to force the collection of additional taxes," which represent "as much of an interference with state tax administration as a suit seeking to enjoin collection of a state tax." *Id.* at 26a, 29a (internal quotations omitted). The court acknowledged that while respondents had not sought to extend the challenged exemptions and exclusions to IMs—"presumably because [respondents] correctly understood that the TIA expressly bars federal court jurisdiction over such claims"—Ohio could remedy any constitutional

violation either by ending the challenged exemptions and exclusions, as respondents requested, or by extending the exemptions to the IMs. *Id.* at 32a. The court "decline[d] to impose its own judgment on the state legislature" by itself determining which of the "two possible remedies" is "appropriate." *Ibid.*

3. The Sixth Circuit reversed. Pet. App. 4a. The court first affirmed the district court's conclusion that the TIA did not foreclose federal jurisdiction. *Id.* at 7a. The court acknowledged that success on respondents' claims "might * * * have *some* negative impact on local revenues" but deemed this insufficient to overcome the rule, purportedly set forth in *Hibbs*, limiting the TIA "to cases in which state taxpayers seek to avoid paying state taxes where success would operate to reduce the flow of state tax revenue." *Id.* at 8a (internal quotations and brackets omitted; emphasis in original).

But the Sixth Circuit held that comity did not bar respondents' federal lawsuit, either. Pet. App. 9a-18a. The court acknowledged a "circuit split" over whether *Hibbs* "limit[ed] an expansive reading of * * * the comity principle's breadth," and embraced the view—expressly rejected by the Fourth Circuit—that "comity guts federal jurisdiction only when plaintiffs try to thwart tax collection." *Id.* at 10a, 11a. According to the Sixth Circuit, a contrary conclusion would render the TIA "entirely superfluous," ignore this Court's supposed "directive" in *Hibbs* "that comity strips jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection," and "*sub silentio* overrule * * * cases" such as *Hibbs*. *Id.* at 17a-18a.

The court of appeals did not go so far, however, as to adopt the view, endorsed by the Seventh Circuit, that the TIA and comity are fully coextensive and apply only "'[w]hen a plaintiff alleges that the state tax collection or refund process is singling her out for unjust treatment.'" Pet. App. 10a (quoting *Levy v. Pappas*, 510 F.3d 755, 761 (7th Cir. 2007)). Rather, the court created a novel, balancing test, whereby the comity bar turns on "the degree to which the claims and relief requested would intrude upon a state's power to organize, conduct, and administer its tax scheme." Pet. App. 14a. Because success on respondents' claims would affect "only" Ohio's four natural gas distributors and "a limited class of exemptions" available solely to them, "the suggested intrusion into traditional matters of state taxation here is not significant enough to trigger comity to bar jurisdiction." *Ibid.*

4. This Court granted certiorari on November 2, 2009.

SUMMARY OF ARGUMENT

Honoring federalism principles, this Court has held consistently that state tax administration should be protected against federal intrusion. Yet, since *Hibbs*, several federal appellate courts, including the Sixth Circuit below, have permitted constitutional challenges to state taxation to proceed in federal court so long as the challengers have contested another's tax liability rather than their own—and thus have not "tr[ied] to thwart state tax collection" directly. Pet. App. 11a. By so limiting the comity bar to direct challenges to the public fisc, however, this approach ignores federalism's broader concerns, which include preserving the presumption that state courts are well-equipped to

resolve questions of federal constitutional law, protecting state officers from being haled into federal court when state law offers relief, and preventing plaintiffs from circumventing established state rules for adjudicating tax challenges.

The Sixth Circuit's approach also channels myriad questions of state law into federal courts, which lack authority to render controlling pronouncements on such issues. The adjudication of inevitably complex issues of state tax law by federal courts increases the likelihood that courts will treat similarly situated parties differently and deprives state courts of the opportunity to develop their own legal doctrine, including, where appropriate, to adopt saving constructions. In fact, this Court's practice, in cases where it has sustained a challenge to a state tax law adjudicated through the state courts, is to remand for state court resolution of any remaining state-law issues, including determining the appropriate relief (which may be more broadly available from state than federal courts). Such proper deference to the state systems is impossible under the decision below.

Nor is an expansive view of federal jurisdiction necessary to ensure that litigants receive the full protections of federal law. State courts are as capable as their federal counterparts of safeguarding constitutional rights. Yet, under the Sixth Circuit's rule, state courts are deprived of the opportunity to resolve issues of federal constitutional law, so long as plaintiffs use artful pleading to select a federal forum.

For all these reasons, the judgment below, which does not follow from either the TIA or *Hibbs*, should be

reversed and state courts restored to their proper role as the principal forum for adjudicating state tax matters.

ARGUMENT

THE SIXTH CIRCUIT'S RULE CONFLICTS WITH HISTORICAL PRACTICES AND THREATENS THE INDEPENDENCE OF STATE TAX ADMINISTRATION.

A. Comity Is A "Vital Consideration" And Has Special Force In Matters Of State Tax Administration.

This Court long ago recognized that "[t]he existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference." *Burgess v. Seligman*, 107 U.S. 20, 33 (1883). And because "[t]he people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws," *Ponzi v. Fessenden*, 258 U.S. 254, 259 (1922), the Court deemed it its "duty * * * to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system coextensive with the United States," *Taylor v. Carryl*, 61 U.S. 583, 595 (1857).

Since these early cases, this Court has identified the "preference" for federal-state harmony—or "comity"—"as a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 96 (1980). It is a "vital consideration," *Younger v. Harris*, 401 U.S. 37, 44 (1971), and "'essential to the federal design,'" *Kowalski v. Tesmer*, 543 U.S. 125, 133 (2004) (quoting *Ruhrgas*

AG v. Marathon Oil Co., 526 U.S. 574, 586 (1999)). Comity embodies

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger, 401 U.S. at 44. Thus, comity counsels federal courts, "anxious though [they] may be to vindicate and protect federal rights and federal interests," to "always endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Ibid.* Then as now, this Court has made clear that federal courts must engage in "forbearance"—"by avoiding interference" with their state counterparts—and thereby limit conflict with state systems. *Covell v. Heyman*, 111 U.S. 176, 182 (1884). This "is a principle of right and of law, and therefore of necessity." *Ibid.*

Matters of state tax administration demand an especially rigorous adherence to comity. Since the founding, it has been recognized that "the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants," and, moreover, that any "attempt on the part of the national government to abridge them in the exercise of [this authority] would be a violent assumption of power." Federalist No. 32 (Alexander Hamilton), reprinted in The Federalist Papers 193-194 (Clinton Rossiter ed., Signet 2003).

This Court accordingly acknowledged more than a century ago that federal interference with the state taxing power uniquely jeopardizes the delicate balance of federal-state relations, for "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. Chicago*, 78 U.S. 108, 110 (1870). More recently, the Court reaffirmed that "the reasons supporting federal non-interference" in state tax administration remain equally "compelling today," *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 527 (1981), reiterating that "[t]he States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation," *Ark. v. Farm Credit Servs. of Central Ark.*, 520 U.S. 821, 826 (1997) ("*Farm Credit Servs.*"); see also *Fair Assessment*, 454 U.S. at 102-103 ("the autonomy and fiscal stability of the States survive best when state tax systems are not subject to scrutiny in federal courts"). In short, "the federal balance is well served when the several States define and elaborate their own [tax] laws through their own courts and administrative processes and without undue interference from the Federal Judiciary." *Farm Credit Servs.*, 520 U.S. at 826.

Thus, comity bars federal courts from rendering declaratory judgments in lawsuits challenging the constitutionality of state tax laws, see *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943), or awarding damages in such cases, see *Fair Assessment*, 454 U.S. at 107. In declining to find federal jurisdiction over these claims, the Court identified broader concerns than merely protecting the public fisc.

See *id.* at 108 n.6. First, challenges to state taxation, even if based on the Federal Constitution, "'are likely to turn on questions of state tax law, which * * * are more properly heard in state courts.'" *Ibid.* (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, *J.*, concurring in part and dissenting in part)). Second, "'[i]f federal * * * relief were available to test state tax assessments, * * * taxpayers might escape the ordinary procedural requirements imposed by state law'" and thus avoid the States' "'established rules'" for adjudicating tax disputes. *Ibid.* (quoting *Perez*, 401 U.S. at 128 n.17) (Brennan, *J.*, concurring in part and dissenting in part)). Third, successful challenges to state tax systems, even if for damages, require a federal court to hold state law unconstitutional, thereby "halt[ing] its operation." *Id.* at 115. And fourth and finally, such challenges have the effect of "hal[ing] state officers into federal court." *Ibid.* The Court thus has articulated and enforced "a federal policy against federal adjudication of [this] class of litigation altogether." *Perez*, 401 U.S. at 115 (Brennan, *J.*, concurring in part and dissenting in part).

By allowing respondents' challenge to Ohio's tax laws to proceed in federal court, the Sixth Circuit violated this entrenched policy and upset the established balance between States and the federal government on questions of state taxation.

B. The Sixth Circuit's Approach Channels Myriad Issues Of State Law To Federal Courts Less Suited To Resolve Them.

The decision below permits challenges to state taxation to proceed in federal court so long as the challengers do not seek openly to "thwart tax

collection," Pet. App. 11a, merely by framing their case as a complaint about another's tax liability rather than their own.[1] This approach forces state authorities to litigate questions of state tax law in federal court. But "[s]tate courts are the principal expositors of state law," *Moore v. Sims*, 442 U.S. 415, 429 (1979), and "have the first and last word as to the meaning of state statutes," *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 247 (1952). Thus, "no matter how seasoned the judgment of [a federal] district court may be" on a question of state law, "it cannot escape being a forecast rather than a determination." *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 499 (1941); accord *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 122 n.32 (1984) ("when a federal decision on state law is

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[1] In an effort to reconcile the decision below with *In re Gillis*, 836 F.2d 1001 (6th Cir. 1988), the Sixth Circuit allowed that comity would bar federal jurisdiction in cases where, although plaintiffs did not challenge their own tax assessments, "the claims and relief requested" threatened sufficiently to "intrude upon a state's power to organize, conduct, and administer its tax scheme." Pet. App. 14a. But the court could not provide any guidance on when this standard might be satisfied. See *id.* at 13a ("we cannot make all-encompassing decrees regarding how principles of comity and federalism will always apply; they are merely *principles*") (emphasis in original). And although the court insisted that success on respondents' claims would affect "only" Ohio's four natural gas distributors and "a limited class of exemptions" available solely to them, Pet. App. 14a, respondents are seeking to rewrite Ohio's tax laws for the State's entire market for selling natural gas to consumers, see Pet. Br. 31-32. Under the Sixth Circuit's approach, therefore, in few (if any) cases will "the suggested intrusion into traditional matters of state taxation" be "significant enough to trigger comity to bar jurisdiction." Pet. App. 14a.

obtained, the federal court's construction is often uncertain and ephemeral"). The problems engendered by adjudicating state tax law issues in the federal courts, which lack the power to render controlling pronouncements of state law, are myriad.

First, routing issues of state law to federal court increases the likelihood that courts will treat similarly situated parties differently. Cf. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594 (1968) (per curiam) (holding that federal court should abstain in favor of state court resolution of issue of state law because "[s]ound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other" parties); *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943) (recognizing that allowing federal courts to adjudicate certain state law claims would cause "[d]elay, misunderstanding of local law, and needless federal conflict with the State policy," and citing instances "where [a] federal court has flatly disagreed with the position later taken by a State court as to State law"). Because a federal court's construction of state law does not bind state courts, "[n]eedless decisions of state law should be avoided [by federal courts] both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (footnote omitted).

Second, federal courts face unique obstacles when addressing state tax matters, which are notoriously intricate, involving fine distinctions and competing state policies. See *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (on equal protection challenge to state tax law, applying "especially deferential" standard of review to state

classifications in recognition of complexity of state taxation schemes); *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 629 (1973) (describing difficulties of assessing Commerce Clause challenge to state tax law, because "for a long time this area of state tax law has been cloudy and complicated"); *Dane v. Jackson*, 256 U.S. 589, 598-599 (1921) ("it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the states for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state Legislatures"). Thus, federal court determinations on issues of state tax law not only are necessarily non-binding predictions, but for institutional reasons they also run a heightened risk of being wrong.

Third, federal courts see themselves as "*Erie*-bound to apply state law as it currently exists," *Solomon v. Walgreen Co.*, 975 F.2d 1086, 1089 (5th Cir. 1992) (per curiam), and therefore approach "innovative theories" of state law "charily" and are "extremely cautious about adopting substantive innovation in state law," *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 578 (6th Cir. 2004) (internal quotations omitted). Accordingly, routing myriad state tax issues to federal court will not only stunt the development of this critical area of state law—which lies at the core of state sovereignty—but it will likely result in the unnecessary resolution of constitutional questions and, worse, in decisions striking down laws that state courts would have preserved with a saving construction. "Almost every constitutional challenge" to a state law "offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional

concerns and state interests." *Moore*, 442 U.S. at 429; accord *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12 (1987). But state courts, as the primary expositors of state law, are uniquely positioned to adopt such constructions. See, *e.g.*, *Pennzoil*, 481 U.S. at 12 (had plaintiff asserted its claims in state rather than federal court, "it was entirely possible that the [state] courts would have resolved this case on state statutory or constitutional grounds, without reaching the federal constitutional questions"). Federal courts, by contrast, are limited by *Erie* in their interpretation of state law and thus poorly placed to interpret state statutes to avoid constitutional problems.

Fourth and finally, in the event that no narrowing construction is reasonably available, a broader range of remedies is available from state than federal courts. Federal courts "may not assess or levy [state] taxes"; accordingly, while they may declare a tax invalid, their authority to provide a remedy is limited. *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961). Thus, in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), this Court, having sustained a challenge to a tax exemption available under Michigan law, remanded the case to state court to determine whether the violation should be remedied by extending or eliminating the exemption. See *id.* at 818. Because "[t]he latter approach * * * could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court," *ibid.*; see also *Moses*, 365 U.S. at 751-752 (court of appeals erred in remanding for district court "to decree a valid tax for the invalid one which the State had attempted to exact," because "[t]he District Court has no power so to decree"), the Court concluded that the Michigan courts, both because of

their less cabined remedial authority and their "special expertise" in matters of state law, "are in the best position to determine how to comply with the mandate of equal treatment," 489 U.S. at 818.[2]

Indeed, in cases where this Court has sustained a challenge to a state tax law adjudicated through the state courts—as most such challenges are—it has invariably remanded to the state court to determine the remedy. See *Davis*, 489 U.S. at 818; *Amer. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 297-298 (1987); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 252-253 (1987); *Williams v. Vermont*, 472 U.S. 14, 28 (1985); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196-197 (1983); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 541 (1933). Comity demands no less. For even where the Court has "jurisdiction of the issue," *Liggett*, 288 U.S. at 541, a proper respect for state functions demands that it decline to "take it upon itself in th[e] complex area of state tax structures to determine how to apply its holding," *Tyler Pipe*, 483

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[2] *Missouri v. Jenkins*, 495 U.S. 33 (1990), held that although a federal court order imposing an increase in property taxes (in excess of limits set by state law) to ensure funding for school desegregation violated federal-state comity, the court could nevertheless require the school district itself to impose such a tax increase. See *id.* at 50-58. The Court emphasized, however, that this "extraordinary" relief, *id.* at 51, was available only because state law was "preventing a local government" from "fulfill[ing] the requirements that the Constitution impose[d] upon" it to remedy segregation, *id.* at 57-58. Both *Jenkins* and *Davis* thus make clear that successful state tax challenges should be remedied whenever possible by state courts in the first instance.

U.S. at 252; see also *Amer. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 176-177 (1990) (plurality op.) ("When we have held state taxes unconstitutional," "considerations of federal-state comity" "require[] that we carefully disentangle issues of federal law from those of state law and refrain from deciding anything apart from questions of federal law directly presented to us."). But if a challenge to a state tax law is allowed to go forward in a lower federal court, recourse to state court for determination of the remedy, or any other question involving state law, is not reasonably available.

For multiple reasons, therefore, the adjudication of issues of state tax law by federal courts—the inevitable result of the Sixth Circuit's approach—poorly serves the courts, the parties, and the development of the law.

C. The Sixth Circuit's Approach Deprives State Courts Of The Opportunity To Resolve Federal Constitutional Issues.

Although federal courts are ill-suited to resolve state law issues arising in challenges to state taxation, the same is not true of state courts faced with issues of federal law. State courts "'have the solemn responsibility equally with the federal courts' to safeguard constitutional rights." *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977) (quoting *Steffel v. Thompson*, 415 U.S. 452, 460-461 (1974)). Indeed, historically, "'state courts provided the only forum for vindicating many important federal claims.'" *Nat'l Private Truck*, 515 U.S. at 588 (quoting *Palmore v. United States*, 411 U.S. 389, 401 (1973)). Consistent with comity, this Court accordingly has "refuse[d]" to "assume[e] that state judges will not be faithful to their constitutional responsibilities." *Huffman v. Pursue, Ltd.*, 420 U.S.

592, 611 (1975); accord *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.") (emphasis in original). The Court has not wavered in its "emphatic reaffirmation . . . of the constitutional obligation of state courts to uphold federal law, and its expression of confidence in their ability to do so." *Allen*, 449 U.S. at 105.

The Sixth Circuit's expansive view of federal jurisdiction therefore is not necessary to ensure that litigants receive the full protections of federal law. And it has the unfortunate effect of preventing States from "'continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against th[eir] policies.'" *Trainor*, 431 U.S. at 443 (quoting *Huffman*, 420 U.S. at 604). The effect is even more damaging in cases where a challenge to state taxation is sustained, because "interests of comity are advanced, and friction reduced, if the courts of a state, rather than the federal courts, determine that the United States Constitution requires the state to alter its practices" in this sphere. *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314, 1318 (8th Cir. 1990).

D. The Sixth Circuit's Approach Promotes "Artful Pleading" To Obtain Federal Jurisdiction.

The rule adopted below not only conflicts with comity's respect for state courts as principal arbitrators of issues of state law and competent adjudicators of federal constitutional claims, but it also runs afoul of

the longstanding prohibition on using "artful pleading" to manufacture federal jurisdiction. The Sixth Circuit's holding that state tax challengers are welcome in federal court so long as they do not openly request "district court aid in order to arrest or countermand state tax collection," Pet. App. 9a (internal quotations omitted), encourages plaintiffs seeking what they perceive as a more favorable federal forum to characterize their complaint as a demand for an increase in another's tax liability rather than a decrease in their own.

But these two ways of framing tax challenges are often interchangeable, and this Court has long refused to sustain efforts to manipulate federal jurisdiction "'by the simple expedient of putting a different label on [the] pleadings.'" *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 833 (1976) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 489-490 (1973)) (brackets in original). For example, the Court, applying the "well-pleaded complaint rule," has rejected attempts to bring a state law suit within federal jurisdiction by anticipating a defense based on federal law. See, *e.g.*, *Franchise Tax Bd. v. Constr'n Laborers Vacation Trust*, 463 U.S. 1, 9-10 (1983); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-674 (1950). Instead, "[s]uch a defense is properly made in the state proceedings, and the state court's disposition of it is subject to this Court's ultimate review." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 478 (1998). To proceed otherwise would "[n]ot only * * * unduly swell the volume of litigation in the District Courts," but "also embarrass those courts—and this Court on potential review—in that matters of local law may often be involved, and the District Courts may either have to decide doubtful questions of State law or hold cases pending disposition of such State issues by State

courts." *Skelly Oil*, 339 U.S. 667 at 673-674. In short, the well-pleaded complaint rule "avoid[s] automatically a number of potentially serious federal-state conflicts." *Franchise Tax Bd.*, 463 U.S. at 9-10.

The decision below contravenes this federalism-based prohibition against artful pleading. Although respondents framed their claim to seek the elimination of LDC tax exemptions and exclusions, they just as easily could have sought to extend the credits to the IMs, and the complaint does not preclude such relief. See Pet. Br. 8 (requesting "[s]uch other relief to which Plaintiffs are entitled"). Respondents declined to characterize their complaint in this way "presumably because they correctly understood that the TIA expressly bars federal court jurisdiction over such claims." Pet. App. 32a. But if respondents were to succeed on the merits, the most likely outcome would be the exemption of IMs from the complained-of taxes, not a termination of the exemptions and exclusions to the LDCs. See Pet. Br. 37-38. Thus, by allowing respondents' suit to proceed in federal court, the Sixth Circuit endorsed their use of drafting sleight-of-hand to manufacture federal jurisdiction over a state tax challenge that properly belongs in state court.

The ease with which respondents were able artfully to plead themselves into federal court under the Sixth Circuit's rule is ripe for replication, should that approach be affirmed. For example, in *Department of Revenue v. Davis*, 128 S. Ct. 1801 (2008), this Court rejected a dormant Commerce Clause challenge to a Kentucky law exempting from state income taxes any interest earned on bonds issued by the State or its political subdivisions, while taxing bond interest from other States. See *id.* at 1804. The plaintiffs, who

pursued their claim through the Kentucky courts, sought to extend the exemption and requested a refund of taxes they had paid on income earned from out-of-state bonds. See *id.* at 1807. Had the plaintiffs instead sought to enjoin the exemption, however, their functionally identical constitutional challenge would have triggered federal jurisdiction under the Sixth Circuit's approach. And although there is no persuasive reason why the latter complaint should go forward in federal court when the former cannot, that is the result of the majority rule that the decision below adopts.

Similarly, the plaintiffs in *Associated Industries v. Lohman*, 511 U.S. 641 (1994), adjudicated in state court—and ultimately this Court—their claim that Missouri's use tax on goods purchased out of state (but stored, used, or consumed in Missouri) impermissibly discriminated against interstate commerce because the use tax exceeded the local sales tax payable on goods purchased in state. See *id.* at 643. The Court agreed that the use tax violated the dormant Commerce Clause, but, rejecting the plaintiffs' requested refund of all monies paid under the use tax, remanded to the state court to determine "[t]he methods best adopted to achieving equal treatment . . . , whether partial or complete refunds *or other measures*." *Id.* at 654, 656 (emphasis added). The Court's recognition that a refund was not the only appropriate remedy obviates any doubt that, had the plaintiffs cast the same challenge differently, they could have (in the Sixth Circuit's view) obtained federal jurisdiction over substantial questions of state tax law.

The same is true of any state court case in which the plaintiffs argued that their tax bill violated federal law because it was excessive when compared to a third

party's. In *Panhandle Producers & Royalty Owners Association v. Oklahoma Tax Commission*, 162 P.3d 960 (Okla. Civ. App. 2007), for example, the plaintiffs sought to enjoin as violating, *inter alia*, the Equal Protection and dormant Commerce Clauses, an Oklahoma statute requiring withholding of income taxes due on certain royalty payments to non-residents, while exempting Oklahoma residents from the withholding requirement. See *id.* at 962-963. The suit was originally filed in federal district court but was dismissed under the TIA. After refiling in state court, the plaintiffs argued for the first time that the alleged violation could be remedied by amending the statute "to require taxes on royalties to be withheld from payments to all interest owners, regardless of residence." *Id.* at 966. Had the plaintiffs sought this relief earlier, the federal district court would have been required to hear their claims under the Sixth Circuit's rule.

Myriad cases are to the same effect. See, *e.g.*, *Ex Parte Hoover, Inc.*, 956 So.2d 1149, 115–1151 (Ala. 2006) (in dormant Commerce Clause challenge to state tax exemption afforded third parties, plaintiffs sought refund of taxes paid); *Smith v. N.H. Dep't of Revenue Admin.*, 813 A.2d 372, 374 (N.H. 2002) (same with regard to dormant Commerce Clause and equal protection challenges); *Northwest Airlines, Inc. v. Dep't of Revenue*, 943 P.2d 175, 177-178, 187-191 (Or. 1997) (plaintiffs sought to have their property tax assessments set aside as excessive when compared with third parties' assessments and thus in violation of federal law); *Amer. Tel. & Tel. Co. v. N.Y. State Dep't of Taxation & Finance*, 599 N.Y.S.2d 238, 239-240 (1993) (in dormant Commerce Clause and equal protection challenges to state tax deduction afforded third parties, plaintiffs

sought refund of taxes paid). Were any of these plaintiffs merely to recharacterize the same constitutional challenge to focus on others' tax assessments rather than their own, the Sixth Circuit would allow their case to proceed in federal district court. And a federal court would have had to undertake an invasive (but ultimately nonbinding) analysis of a State's taxing scheme that is properly reserved to state courts in the first instance. The prohibition against such artful pleading thus provides an additional reason to reject the Sixth Circuit's rule.

E. The Sixth Circuit's Approach Does Not Follow From Either The TIA Or *Hibbs*.

The Sixth Circuit relied on *Hibbs* to hold that comity's reach is essentially coextensive with that of the TIA and that the TIA precludes federal jurisdiction only where plaintiffs choose to cast their complaint as a challenge to their own tax bill. See Pet. App. 7a, 11a; see also *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 18 (1st Cir. 2009) (in light of *Hibbs*, abrogating more expansive view of comity in *U.S. Brewers Ass'n v. Cesar Perez*, 592 F.2d 1212 (1st Cir. 1979)). But *Hibbs* does not compel the result below.

First, before *Hibbs*, this Court made clear that the interests protected by comity are not coextensive with those safeguarded by the TIA. *Hibbs*, which addressed comity in a footnote and did not purport to overrule decades of jurisprudence protecting "the delicate balance between the federal authority and state governments, and the concomitant respect that should be accorded state tax laws in federal court," *Fair Assessment*, 454 U.S. at 108, does not hold otherwise.

The TIA embodies but "one manifestation" of the traditional "aversion" to federal-court interference in state tax administration. *Nat'l Private Truck Council*, 515 U.S. at 586. While the TIA "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations," only the "last consideration" "was the principle motivating force behind the Act." *Rosewell*, 450 U.S. at 522 (internal quotations omitted). The TIA "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Ibid.*; accord *Fair Assessment*, 454 U.S. at 183.

Because Congress did not "intend[] that federal-court deference in state tax matters be limited to the actions enumerated in [the TIA]," *Fair Assessment*, 454 U.S. at 183, the TIA is "best understood as but a partial codification of the federal reluctance to interfere with state taxation," *Nat'l Private Truck Council*, 515 U.S. at 590; accord *Rosewell*, 450 U.S. at 525 (rejecting view that with the TIA "every wrinkle of federal equity practice was codified, intact, by Congress"). The TIA's enactment therefore was not "an indication of disapproval of the policy of federal equity courts, or a mandatory withdrawal from them of their traditional power to decline jurisdiction in the exercise of their discretion." *Great Lakes*, 319 U.S. at 301; accord *Fair Assessment*, 454 U.S. at 183 ("the principle of comity which predated the Act was not restricted by its passage"). As a result, "even where the [TIA] would not bar federal-court interference in state tax administration, principles of federal equity may nevertheless counsel the withholding of relief." *Rosewell*, 450 U.S. at 525 n.33.

These decisions dispel the Sixth Circuit's concern that a "broad view of comity would render * * * [the TIA] effectively superfluous." Pet. App. 11a. There is no reason why Congress would not have sought to codify certain aspects of existing federal-court practice to respond to the problems that legislators deemed most urgent.[3] And even if the TIA were more than a mere partial codification of comity principles, it still would not be "superfluous." The TIA "limit[s] drastically federal district court *jurisdiction* to interfere with so important a local concern as the collection of taxes." *Rosewell*, 450 U.S. at 522 (emphasis added). The TIA does not alter the federal courts' historic ability to refrain from hearing challenges to state taxation that stand to increase tax revenues but nevertheless implicate federalism concerns.

Second, even if, under the circumstances presented, *Hibbs* limited the reach of both the TIA and comity to cases in which plaintiffs frame their complaint as a challenge to their own tax liability, *Hibbs* is distinguishable from this case in several ways.

Central to comity is federalism's respect for the role of state courts as principal arbiters of state law. See *supra* pp. 10, 11-12. This Court in *Hibbs* acknowledged

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[3] Congress enacted the TIA to eliminate disparities between those taxpayers who could obtain injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and those required to proceed in state courts, which generally require taxpayers to pay first and litigate later. See *Rosewell*, 450 U.S. at 522 n.29. Congress was also concerned that taxpayers, with the aid of a federal injunction, could withhold large sums, thereby disrupting government finances. See *id.* at 526.

this interest, see 542 U.S. at 106 n.8 (describing States' "vital" interest in their courts' "authority * * * to determine what state law means"), but noted that it was not implicated because there was "no disagreement as to the meaning of" state law and thus no call for the federal district court "to interpret any state law," *ibid.*; see also *Fair Assessment*, 454 U.S. at 107 n.4. (declining to decide whether comity would bar claim for damages that "requires no scrutiny whatever of state tax assessment practices"). The Court did not suggest that the comity bar would not apply where, as here, see Pet. Br. 27-28, 32-33, the plaintiffs' constitutional claims are intertwined with disputed issues of state law.

Hibbs does not compel a departure from the federalism-based prohibition against artful pleading, either, because the plaintiffs there could not have recast their complaint as a suit to contest their own tax liability. Success on the Establishment Clause claims could not be remedied other than through the relief the plaintiffs requested—an injunction against the Arizona law authorizing tax credits for charitable contributions made by Arizona taxpayers to "school tuition organizations," as well as the return to the State's general fund of monies already distributed to (but not yet spent by) the STOs. See *Winn v. Killian*, 307 F.3d 1011, 1014 (9th Cir. 2002). Because the Court was not asked to decide whether federal jurisdiction exists where the plaintiffs could have but did not challenge their own tax liability directly, *Hibbs* does not control the outcome of the present case.

Finally, crucial to *Hibbs*' conclusion that the TIA did not bar federal jurisdiction was the fact that "in decisions spanning a near half century" federal courts had adjudicated challenges to state tax credits as

racially discriminatory. 542 U.S. at 93. By contrast, claims like respondents'—dormant Commerce Clause and Equal Protection challenges to a State's allegedly favorable tax treatment of business competitors—have invariably been adjudicated in state courts, with ultimate review available in this Court. See, *e.g.*, *Dep't of Revenue v. Davis*, *supra* pp. 19-20; *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 285-286 (1997); *Dennis v. Higgins*, 498 U.S. , 441-42 (1991); *Scheiner*, 483 U.S. at 268-269; *Tyler Pipe*, 483 U.S. at 239-240; *Bacchus*, 468 U.S. at 265-267; *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 396-397 (1984); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 65-68 (1963). *Hibbs* did not purport to overrule this long-settled practice of affording state courts the first opportunity to adjudicate claims that their State's tax law has violated the Constitution by providing a competitive advantage to certain businesses.

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This Court should reverse the decision of the Sixth Circuit below and make clear that *Hibbs* did not jettison the Court's long-settled deference to state courts as the principal forum for adjudicating state tax challenges, respect for the state courts' ability to resolve federal constitutional claims, and resistence to efforts at manipulating federal jurisdiction through "artful pleading."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

RICHARD A. LEVIN, TAX COMMISSIONER OF OHIO,
Petitioner,

v.

COMMERCE ENERGY, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF MULTISTATE TAX COMMISSION as *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF THE AMICUS CURIAE

Amicus curiae Multistate Tax Commission respectfully submits this brief in support of Richard A. Levin, Tax Commissioner of Ohio. The decision of the Sixth Circuit in this case should be reversed. The federal district court should not have exercised original jurisdiction to entertain the Taxpayer's request under the "dormant" commerce clause, U.S. Const. Art. 1, § 8, for injunctive and declaratory relief pertaining to the application of three major Ohio taxes.

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967. *See, United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978) (upholding the validity of the Compact). Today, forty-seven states and the District of Columbia are members of the Commission.[2] The purposes of the Compact

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus* Multistate Tax Commission and its member states through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the State of Ohio. Finally, this brief is filed with the consent of the parties.

[2] *Compact Members*: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. *Sovereignty Members*: Georgia, Kentucky, Louisiana, Maryland, New Jersey,

are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration, and (4) avoid duplicative taxation. *Multistate Tax Compact*, Art. I. States' adoption of the Compact was critical to preserving the sovereignty the states enjoy with respect to taxation of interstate commerce. *See, H.R. Rep.* No. 89-952, Pt. VI, at 1143 (1965) *and Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Commission on the Judiciary*, 89th Cong., 2d Sess. (1966) (illustrating the depth and scope of Congressional inquiry into the potential for federal preemption as a means of increasing state corporate income tax uniformity). Preserving state tax sovereignty under our vibrant federalism remains one of the main purposes of the Compact and the Commission.

The Commission's interest in this case arises from our purpose of preserving the states' authority to determine their own tax policies within federal constitutional and statutory limitations, and in protecting that authority from federal interference beyond what is expressed by the Constitution or by Congress. The Sixth Circuit's expansive interpretation of the federal district courts' original jurisdiction to include consideration of state tax matters arising from the dormant

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and West Virginia. *Associate Members*: Arizona, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin, and Wyoming.

commerce clause would result in unprecedented interference with state sovereignty in contravention of Acts of Congress, and federalist principles.

SUMMARY OF ARGUMENT

The Tax Injunction Act should be interpreted to bar not just federal cases where taxpayer is seeking to enjoin state tax assessments, but any federal case where a post-deprivation refund or retroactive assessment of a favored class is available in state court and would be a complete remedy. Furthermore, because equity relief is broad and intrusive, this Court's precedent supports deference to state courts in any case where equity relief is requested, even if not barred by the Tax Injunction Act.

ARGUMENT

I. The Tax Injunction Act Bars Federal District Court Jurisdiction in State Tax Cases Alleging Discrimination Under the Dormant Commerce Clause.

Congress' enactment of the Tax Injunction Act (TIA) barred federal district courts from enjoining "the assessment, levy, or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the Courts of such state." 28 U.S.C. § 1341. The 6th Circuit determined that the TIA did not apply to bar federal courts from granting the declaratory and injunctive relief requested in this case. That determination was drawn from *Hibbs* v. *Winn*, 542 U.S. 88 (2004). *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094 (6th Cir., 2009).

In *Hibbs*, plaintiffs claimed the state violated the first amendment of the United States Constitution by allowing an

income tax credit for contributions to non-profit organizations that awarded educational scholarships and tuition grants to children attending private schools. The Court found that the TIA did not bar "[t]hird-party suits [that are] not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs*... ." 542 U.S. at 90, *referencing McGlotten* v. *Connally*, 338 F. Supp. 448, 453-454 (DC 1972)(challenging income tax exemptions for fraternal orders that excluded non-whites), and *Tax Analysts and Advocates* v. *Shultz*, 376 F. Supp. 889, 892 (DC 1974)(permitting challenge to I.R.S. determination that certain contributions to political candidates could be deducted in computing federal tax liability.).

But *Hibbs* is distinguishable from a dormant commerce clause discrimination case. In a dormant commerce clause discrimination case, the plaintiffs are taxpayers, not "third parties" in the sense that term was used in *Hibbs*. The state tax statutes that these taxpayers complain of are imposed upon them, and it is precisely this imposition that forms the basis for the taxpayers' complaint – that the imposition, in particular the imposition relative to other taxpayers, is discriminatory under the dormant commerce clause. A taxpayer contesting its "relative" tax liability is, in all senses relevant to the TIA, contesting its own tax liability.

This distinction is relevant because of the difference in remedies that are available when the offense that must be cured is a discriminatory tax imposition on commercial interests rather than a deprivation of a civil right. In *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 654 (1994), this Court made clear that under the dormant commerce clause "equality for the purposes of the flow of commerce is measured in dollars and cents, not legal abstraction", *quoting*, *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 70 (1963). In *McKesson Corp. v.*

Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation, 496 U.S. 18 (1990), this Court explained that in cases where a tax is invalid because it discriminates, the spectrum of possible remedies includes pre-deprivation relief (including injunctions to halt either the discriminatory benefit or the discriminatory harm), or post-deprivation relief. 496 U.S. at 36-37. Possible post-deprivation relief includes refunds (to the harmed taxpayer), assessments (against the benefited competitors), or some combination of both:

> Florida may reformulate and enforce the [tax] during the contested tax period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause ... More specifically, the state may cure the invalidity of the [tax] by refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received...the State may assess and collect back taxes from petitioner's competitors... Finally, [the State may also cure through] a combination of a partial refund to petitioner and a partial retroactive assessment of tax increases on favored competitors ....

McKesson Corp., 496 U.S. at 40-41.

Thus, in any dormant commerce clause case where a state can cure the alleged constitutional defect in its taxing system through a combination of refunds or assessments against the favored parties, there is a "plain, speedy and efficient remedy" available in the state courts, precluding federal court intervention under the TIA. 28 U.S.C. § 1341.

Allowing such claims to proceed in federal court may actually restrict the range of remedies which may have been available under state law. In *Reynoldsville Casket Co., et al. v. Hyde,* 514 U.S. 749 (1995), this Court recognized "a particular kind of constitutional violation…[that] depends, in critical part, upon differential treatment of two similar classes of individuals, [where] one might cure the problem either by similarly burdening, or by similarly unburdening, both groups." *Reynoldsville,* 514 U.S. at 755.

While a taxpayer may request specific forms of relief that would not reduce the public fisc, that request should in no way operate to eliminate otherwise available remedies that may better serve the public interest. Yet this elimination of remedies is exactly what would happen if, by limiting its requested relief, a taxpayer could maintain original jurisdiction in federal district court, where, in recognition of important federalism and comity principles, Congress has limited the relief that the federal courts can provide. Lawful remedies that a state court, and ultimately a state legislature, may feel are in the public interest would be off the table.

By contrast, no such restriction of remedies resulted from exercising original federal jurisdiction in cases such as *Hibbs*. The deprivation of plaintiffs civil rights caused by the state's First Amendment violation in *Hibbs*, and the kinds of harms identified in other cases cited in *Hibbs* where the federal court jurisdiction was upheld despite the TIA, could not be cured through a post-deprivation refund to plaintiffs or other state tax remedies. That is, these harms could not be cured through state tax remedies, such as refunds or injunctions against assessments, that were not available at the federal level. The plaintiffs in *Hibbs* were concerned that the state was impermissibly promoting religion by granting credits for payments to "school tuition organizations" established to fund schools that provided "religious

instruction" as part of the curriculum or which conditioned admission on the basis of "religious affiliation." 542 U.S. at 94-95. The plaintiffs sought to end that practice in order to make more money available for public purposes, including education. *Id.* at 99-100. Since the plaintiffs sought to end what they viewed as impermissible state support of religious activity, even a tax refund equal to the credit received by other taxpayers would not have made them whole. *See also, Moton* v. *Lambert*, 508 F. Supp. 367, 368 (N.D. Miss. 1981) (challenge to tax exemptions for racially discriminatory private schools may proceed in federal court); *Franchise Tax Board of California* v. *United Americans for Public Schools*, 419 U. S. 890 (1974) (summarily affirming district-court judgment striking down state statute that provided income-tax reductions for taxpayers sending children to private schools).

The simple fact that a taxpayer can fashion a remedy request into one that is not barred by the TIA should not allow the taxpayer to cut off other, state-available remedies that may better serve the public interest. Where a statute's unconstitutional effects can be completely cured by the full range of available state tax remedies, the case cannot proceed in federal court under the TIA. Thus, the TIA should be interpreted to bar not just cases where the taxpayer requests an injunction of state taxes (or its equivalent, post-deprivation refunds), but to bar any case where such remedies would be compensatory and are available.

This interpretation is valid under the specific language of the TIA. In a dormant commerce clause discrimination case, with monetary remedies available in state court, a federal injunction of a credit against the benefited party would necessarily "restrain" the state from, alternatively, enjoining the assessment of the tax against the burdened party. Where there are alternative, complete remedies available in state

courts, Congress can not have intended that TIA be interpreted to short-circuit the potential application of these remedies through a taxpayer's narrow pleading of the relief sought in federal court.

The TIA applies in dormant commerce clause discrimination cases. Any state tax case claiming discrimination under the dormant commerce clause directly concerns the imposition of a tax upon a taxpayer. And, regardless of the taxpayer's requested relief, the possible remedies in such a case should include an injunction against the collection of that tax or the allowance of refunds under state law. The language of the TIA supports this interpretation.

II. Even if Jurisdiction is Not Barred by the Tax Injunction Act, the Federal Court Should Defer Consideration of State Tax Cases Alleging Discrimination Under the Dormant Commerce Clause in Accordance with Principles of Comity.

If the TIA does not bar this case, principles of federalism and comity should. Even though the district courts are courts of both law and equity, equitable relief is extraordinary relief that should not be issued where an adequate and complete remedy exists at law:

> This withholding of extraordinary relief by courts having the authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts ... on the contrary, it is but a recognition that the jurisdiction conferred on the federal courts embraces suits in equity as well as law, and that a federal court of equity, which may in an appropriate case refuse to give its special protection

> to private rights when the exercise of its jurisdiction would be prejudicial to the public interest, *should stay its hand in the public interest when it reasonably appears that private interests will not suffer.* 'It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.'

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297-298 (1943) (internal citations omitted).

As far back as 1871, Congress and this Court "have shown an aversion to federal interference with state tax administration. The passage of the TIA is one manifestation of this aversion." *National Private Truck Council v. Oklahoma Tax Commission*, 515 U.S. 582, 586 (1995). *See, Dows v. Chicago*, 11 Wall. 108 (1871); *See, also, Matthews v. Rogers*, 284 U.S. 521 (1932); *Fair Assessment in Real Estate Association, Inc., et al., v. McNary, et al.*, 454 U.S. 100 (1981); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943). In cases under the dormant commerce clause alleging discrimination against private commercial interests, "[a]n actual refund or other retroactive adjustment of the tax burdens between TP and its favored competitors can bring about the *nondiscrimination* that 'prompt injunctive relief would have achieved." *McKesson*, 496 U.S. at 43 (emphasis added).

Where, as in this case, complete remedies are available in state courts, principles of comity counsel that a federal district court should stay its hand. There is no need for special protection of these private rights through intrusive equity remedies, and the exercise of federal original jurisdiction would be highly prejudicial to the public interest. Where a state has adopted particular tax structures with

particular remedies allowed for contested taxes, those structures should be allowed to operate. The State of Ohio's brief thoroughly illustrated its considerable public interests in these structures and remedies. We emphasize, without repeating, those interests here.

CONCLUSION

The decision of the Sixth Circuit in this case should be reversed.

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